

## Misdirected Reform: On Regulating Consensual Sexual Activity between Teenagers

Charles A. Phipps

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# MISDIRECTED REFORM: ON REGULATING CONSENSUAL SEXUAL ACTIVITY BETWEEN TEENAGERS

*Charles A. Phipps*<sup>†</sup>

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## INTRODUCTION

When the question of using the criminal law as a tool to regulate the sexual behavior of adolescents is raised, volatile socio-political issues collide. As adolescents grow closer to adulthood, the more difficult it is to fairly and consistently grant them autonomy while protecting them from potentially harmful conduct—even conduct they wish to engage in voluntarily. Thus, anyone who attempts to tackle the issue of regulating the sexual activity of minors stumbles into a host of related issues that complicate an already difficult subject.

On one side of the debate are children's rights advocates who seek to increase the decisionmaking authority of adolescents and, therefore,

recommend a fundamental rethinking of how adolescent sexuality is regulated.<sup>1</sup> Likewise, criminal law commentators object to the criminalization of an activity solely on moral grounds and view laws that regulate voluntary sex between teenagers as being in the same category as the now-obsolete fornication and adultery offenses.<sup>2</sup>

In contrast, pragmatic state legislators concerned with the perception that they are condoning (or worse, encouraging) teenage sexual activity are reluctant to repeal laws that prohibit voluntary sex between teenagers.<sup>3</sup> Policymakers likewise worry that permitting adolescents the right to engage in adult-like decisionmaking regarding sexual activity opens the floodgates to even more difficult issues.<sup>4</sup> The logical next step would be to grant adolescents the authority to control their health care decisions (e.g., abortion), the right to determine their religion regardless of their parents' views and, in short, the right to be completely independent of parental authority before attaining adulthood.<sup>5</sup> Proponents of this view further argue that if adolescents are granted such broad rights, should they not then carry adult-like responsibilities?<sup>6</sup> If so, adolescents should receive adult penal sanctions from criminal behavior, and teenage boys should be accountable for the financial support of children they father.<sup>7</sup>

Even though laws regulating the sexual activity of adolescents significantly impact society, critical consideration of these laws is rarely found in legal literature. Considerable scholarly debate has centered around rape reform,<sup>8</sup> the Supreme Court's decision to allow gender dis-

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<sup>1</sup> See, e.g., ROGER J.R. LEVESQUE, ADOLESCENTS, SEX AND THE LAW 60-72, 232-35 (2000); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265 (2000).

<sup>2</sup> For a discussion of the view that morality and paternalism generally are inadequate grounds for criminalizing behavior, see JOEL FEINBERG, HARMLESS WRONGDOING 318-24 (1988). See also Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999) (providing a concise overview and a history of the debate over whether behavior should be made criminal based on moral justifications alone).

<sup>3</sup> See Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1508 n.14 (1998) (discussing political opposition that accused rape reform legislation of "licensing teenage sexual conduct").

<sup>4</sup> For evidence of these fears, see Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 LOY. POVERTY L.J. 55 (1998) (addressing arguments that the U.N. Convention on the Rights of the Child grants children too much autonomy).

<sup>5</sup> *Id.*

<sup>6</sup> For a discussion of many of these issues, see Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-making Capacity of Minors*, 48 EMORY L.J. 65 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., SUSAN BROWN MILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975); SUSAN ESTRICH, REAL RAPE (1987); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998); Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663 (1999); Bienen, *supra* note 3; David P. Bryden & Sonja

parity in the enforcement of a California law,<sup>9</sup> a reasonable mistake of age defense,<sup>10</sup> and, most recently, federal legislation encouraging states to enforce statutory rape laws in an effort to reduce public assistance to teenage girls and their children.<sup>11</sup>

However, only a handful of legal commentators have examined carefully the question of how, and whether, the criminal law should regulate voluntary sexual activity between teenagers.<sup>12</sup> One of the few extensive commentaries is provided by Model Penal Code commentators,<sup>13</sup> yet this commentary has proven to be considerably out of step with the law in most states and does not reflect more recent developments in the law or social sciences.<sup>14</sup> The absence of analysis means that questions concerning the legitimacy of such laws, their scope, and their fundamental structure have been ignored in large part by the academic community.

Professor Michelle Oberman is one of the few regular contributors to the foundational discussion on the validity and construction of the criminal law in regulating sexual activity of minors. In a series of articles, Oberman has explored unjust enforcement of statutory rape laws in further detail, presenting cases in which older boys and men have escaped criminal responsibility after engaging in sexual intercourse with younger girls under circumstances—such as gang or “posse” situations—that make it difficult to believe the girls willingly participated in the ac-

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Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194 (1997); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409 (1998); Lynne Henderson, *Just What Part of No Don't You Understand?*, 2 TEX. J. WOMEN & L. 41 (1993); Andrew E. Taslitz, *Race and Two Concepts of Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3 (2000).

<sup>9</sup> See, e.g., Alice Susan Andre-Clark, Note, *Whither Statutory Rape Laws: Of Michael M., The Fourteenth Amendment, and Protecting Women from Sexual Aggression*, 65 S. CAL. L. REV. 1933 (1992).

<sup>10</sup> See Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815 (1996); Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1966).

<sup>11</sup> See Elizabeth Hollenberg, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267 (1999); Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463 (2000). See *infra* notes 302–09 and accompanying text for discussion of the term “statutory rape.”

<sup>12</sup> See Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205 (1998); Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287 (1997); see also Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251 (1998) (arguing for changes in sentencing structure to address perceived injustices in the enforcement of statutory rape laws).

<sup>13</sup> See MODEL PENAL CODE §§ 213.1–213.4 (1985).

<sup>14</sup> See Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL L. J. 1, 17–26 (1997) (discussing the Model Penal Code commentary).

tivity.<sup>15</sup> In these articles, she considers the background of statutory rape laws,<sup>16</sup> gender inequality,<sup>17</sup> prosecutorial discretion,<sup>18</sup> the capacity of minors to consent,<sup>19</sup> sociological literature on sexuality,<sup>20</sup> and gender roles in American society.<sup>21</sup>

Oberman focuses on the substantive criminal law as the key to reform:

The underlying problem of socializing girls for subordination in their sexual encounters, as well as in general, is fundamental and deadly serious . . . . It is therefore central to the feminist task to determine how we should understand, honor, and protect girls' incipient sexuality. Statutory rape laws are central to this task, but in order to use them, girls and women must first reclaim these laws.<sup>22</sup>

Rather than viewing statutory rape laws as an antiquated form of unwanted paternalism, Oberman argues that these laws—once re-

<sup>15</sup> See Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Laws*, 85 J. CRIM. L. & CRIMINOLOGY 15, 15–17 (1994) [hereinafter *Turning Girls into Women*] (discussing the “Spur Posse” case in Los Angeles); Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 718–29 (2000) [hereinafter *Regulating Consensual Sex*] (presenting additional cases); Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 825 (2001) [hereinafter *Girls in the Master's House*].

<sup>16</sup> See *Girls in the Master's House*, *supra* note 15, at 800–08; *Regulating Consensual Sex* *supra* at note 15, 709–13; *Turning Girls into Women*, *supra* note 15, at 24–36.

<sup>17</sup> See *Turning Girls into Women*, *supra* note 15, at 61–68; *Regulating Consensual Sex*, *supra* note 15, at 713–17.

<sup>18</sup> See *Turning Girls into Women*, *supra* note 15, at 37–38.

<sup>19</sup> See *id.* at 42–53. The term “consent” is problematic because it has a legal meaning that is at odds with its everyday use. That is, children under a specified age are presumed by law to be incapable of consenting to sexual activity, yet often the term *consent* must be used to describe the subjective state of mind of a participant to sexual activity. Because of these dual meanings, “consent” is a less than ideal term to describe a minor's state of mind concerning a sexual act. Unfortunately, alternative terminology often is no better.

Joel Feinberg recommends using the term “expresses willingness,” which is mostly accurate, though it fails to account for the silent person who subjectively is a willing participant but does not make any outward expression of willingness. JOEL FEINBERG, *HARM TO SELF* 331 (1986). Likewise, the term may not accurately describe a person who expresses willingness verbally, but feels pressure to do so and therefore, subjectively, is not a willing participant. Oberman often uses the terms “voluntary/nonvoluntary” to express a child's subjective state of mind. This, too, is potentially problematic, as Feinberg demonstrates. See *id.* at 115. Because no single term is accurate in all contexts, I use these terms interchangeably to describe a minor who: (1) would say that she or he was a willing participant to a sexual act; and (2) notwithstanding contradictions in the law presuming incapacity of a minor, all objective measures of the minor's conduct demonstrate that the minor's expression of willingness is meaningful.

<sup>20</sup> See *Turning Girls into Women*, *supra* note 15, at 53–70.

<sup>21</sup> See *id.* at 53–59.

<sup>22</sup> See *Girls in the Master's House*, *supra* note 15.

claimed—should be viewed as a necessary tool to protect teenage girls from men and boys.<sup>23</sup> While recognizing that feminists fighting to overcome inequality have not traditionally adopted such a view,<sup>24</sup> Oberman stresses that these laws need to be used to provide girls a safe environment in which to explore their sexuality.<sup>25</sup>

Because few have focused attention on these issues and even fewer have made concrete recommendations,<sup>26</sup> I will outline, analyze, and respond to her series of articles on this topic.<sup>27</sup> In Part I of this article, I summarize Oberman's arguments and her recommendations for reconfiguring the law of statutory rape. In Part II, I critique her analysis and her underlying assumptions in some detail. Although I concur with her analysis of the fundamental social problems and challenges facing adolescent girls, I conclude that her recommendations would not result in greater protection of girls from coercive sexual activity. In Part III, I articulate my proposals for constructing the substantive criminal law to identify and respond to the problem of non-voluntary teenage sexual activity.

## I. THE RECONFIGURATION

### A. UNDERLYING ASSUMPTIONS

The factual and legal assertions Oberman makes in analyzing contemporary problems and potential solutions fall into three categories: assertions about the law, assertions about the victims, and assertions about the prosecutorial dilemma.

#### 1. *The Law and Its Application*

Oberman states that the offense of statutory rape is committed any time two teenagers engage in sexual intercourse,<sup>28</sup> a common occurrence in the "promiscuous era" in which we live.<sup>29</sup> In the opening paragraph of *Regulating Consensual Sex with Minors: Defining a Role for Statutory*

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<sup>23</sup> See *id.* at 820–21.

<sup>24</sup> See *id.* at 824 (noting that feminists have not been "outspoken advocates" of statutory rape laws).

<sup>25</sup> See *id.* at 825.

<sup>26</sup> For another tangible proposal, see Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 326 (1997).

<sup>27</sup> In her attempts to formulate the law, Oberman has moved from broad, general considerations to concrete proposals for reform. Cf. *Turning Girls into Women*, *supra* note 15, at 73 ("rather than proposing a solution. . .") with *Regulating Consensual Sex*, *supra* note 15, at 775 ("I propose a series of law reforms. . ."). Because *Regulating Consensual Sex* presents the most concrete proposal, my critique focuses primarily on this article.

<sup>28</sup> See *infra* note 148 for quotes from Oberman's articles that demonstrate her view of the scope of the laws.

<sup>29</sup> *Regulating Consensual Sex*, *supra* note 15, at 733 (discussing solutions for a "promiscuous era").

*Rape*, Oberman asserts that data on teenage sexual activity reveal a “staggering” number of at least 7.5 million incidents of statutory rape each year.<sup>30</sup> Her reasoning is: (1) there are fifteen million teenagers “between the ages of thirteen and sixteen” in the United States; (2) studies show that half of these teenagers are sexually active; and (3) because statutory rape laws prohibit all such sexual activity, “there are *at least* 7.5 million incidents of statutory rape per year.”<sup>31</sup> Moreover, she claims the estimate is “admittedly low” because her calculation does not account for children under thirteen who are sexually active, nor does it account for repeated acts of sexual intercourse.<sup>32</sup>

In short, Oberman concludes that each time a person under the age of sixteen engages in an act of sexual intercourse, such an act constitutes “a separate instance of statutory rape” since “the age of consent to sexual contact under the vast majority of state statutes is sixteen or older.”<sup>33</sup>

## 2. *The Victims*

A second major theme in Oberman’s work is that girls face particular social and personal barriers that affect their ability to meaningfully consent to sexual activity with boys. For example, she states:

Many authors, including myself, have written about the various factors that make teenage girls susceptible to coercion and abuse in sexual encounters. . . . Investigators studying adolescent sexuality have identified a multiplicity of factors beyond sexual desire and love that lead teenagers to consent to sex. Among these are fear, confusion, coercion, peer pressure, and a desire for male attention.<sup>34</sup>

Because of these susceptibilities, Oberman asserts that adolescent girls often strike “painfully one-sided” bargains, appearing to consent to sexual activity under circumstances difficult for adults to understand.<sup>35</sup> Thus, in many circumstances, a girl’s consent falls into “the gray area that lies between mutually desired, pleasurable sex and rape.”<sup>36</sup> For this reason, she argues that statutory rape laws are needed to protect teenage girls from such encounters.<sup>37</sup> She explores several case studies highlighting four factors—intimidation, acquiescence, adolescent naiveté,

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<sup>30</sup> *Id.* at 703–04.

<sup>31</sup> *Id.* (emphasis in original).

<sup>32</sup> *Id.* at 704 n.3.

<sup>33</sup> *Id.* at 703.

<sup>34</sup> *Id.* at 709.

<sup>35</sup> *Id.* at 714.

<sup>36</sup> *Id.* at 733.

<sup>37</sup> See *Girls in the Master’s House*, *supra* note 15, at 825.



and silence—that “contribute to the problem of nonvoluntary, yet ‘consensual’ sex among adolescents.”<sup>38</sup>

a. Intimidation

Oberman first points to several cases involving older teenage boys or men who, as a group, engaged in planned sexual activity with younger girls and who viewed their activity as a game or conquest. For example, she discusses the “Spur Posse,” a case in which a group of teenage boys competed with each other to see who could have the greatest number of sexual encounters with girls.<sup>39</sup> Even though there were reports that the boys used overt coercion and violence, the district attorney did not prosecute most of the boys.<sup>40</sup> Oberman points to a similar case from Michigan in which high school senior boys targeted freshman girls.<sup>41</sup> The boys took the girls to one of their homes, gave the girls alcohol and asked the girls to perform oral sex on them.<sup>42</sup> Four of the boys subsequently pled guilty to relatively minor offenses and were sentenced to short jail terms.<sup>43</sup>

Additionally, Oberman describes a case from Chicago in which an eleven-year-old and a twelve-year-old girl stayed with older teen boys in a motel room over a weekend. During this time, at least twelve different boys had sexual intercourse with each of the girls. Despite the fact that such conduct was clearly illegal under Illinois law, the investigating law enforcement officer did not pursue criminal charges against the boys.<sup>44</sup>

Oberman accurately portrays these situations as involving “predatory sex,” commenting that “it is absurd to consider these encounters consensual.”<sup>45</sup> She uses the above cases to illustrate how boys can intimidate girls into participating in unwanted sex acts without resorting to overt force.<sup>46</sup>

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<sup>38</sup> *Regulating Consensual Sex*, *supra* note 15, at 717–18.

<sup>39</sup> *See id.* at 718.

<sup>40</sup> *See Turning Girls into Women*, *supra* note 15, at 15–18 (discussing the press accounts of the case in greater detail).

<sup>41</sup> *See Regulating Consensual Sex*, *supra* note 15, at 718–19.

<sup>42</sup> *See* Justin Hyde, *Three Go to Jail in Grosse Pointe Rape Case*, GRAND RAPIDS PRESS, Oct. 27, 1998, at B4 (Four boys ultimately went to jail in the case.).

<sup>43</sup> *Id.*

<sup>44</sup> Oberman cites only to an interview with a rape victim advocate for the facts of this case. *Regulating Consensual Sex*, *supra* note 15, at 719 n.54.

<sup>45</sup> *Id.* at 721.

<sup>46</sup> *See id.*

b. Acquiescence

Oberman points to *State v. Hemme*<sup>47</sup> to illustrate the dynamic of a girl acquiescing to a boy rather than resisting his sexual advances.<sup>48</sup> Joshua Hemme was nineteen years old when his younger brother was “seeing” a thirteen-year-old girl, identified by the court as S.Q. One day after school, Hemme called S.Q. and repeatedly asked her to come over to his house. She finally gave in and when she arrived at his house, Hemme took her to his room in the basement. Even though she told him several times she did not want to have sex, he repeatedly fondled her and asked her to have sex. Eventually, she sat on a bed with Hemme, and they began to engage in sexual acts.<sup>49</sup>

Oberman uses this case to demonstrate the difficulty in proving force, and notes that if the victim were fourteen rather than thirteen, “the encounter would not have been criminal.”<sup>50</sup> Moreover, she asserts that this case demonstrates the “girl’s inability to protect herself against being coerced to participate in [an] unwanted sexual encounter,” and she speculates that the same scenario could plausibly happen if the male were sixteen rather than nineteen.<sup>51</sup>

c. Adolescent Naiveté

To demonstrate adolescent naiveté, Oberman discusses *State v. Smith*,<sup>52</sup> in which three teenage males—ages sixteen, seventeen, and nineteen—engaged in various sex acts with a thirteen-year-old girl. The victim was initially alone with the two younger males in her backyard, where they asked her to engage in sex acts with them. After the nineteen-year-old Smith arrived, each of the three boys either performed or attempted to perform sex acts with the victim. Eventually, the defendant told the younger boys to leave, at which time he engaged in several sex acts with the victim.<sup>53</sup>

The two younger boys were not prosecuted, and the nineteen-year-old was convicted “only of committing a lewd act on a minor.”<sup>54</sup> Oberman notes that the trial court departed downward from the sentencing guidelines based on the victim’s consent.<sup>55</sup> She uses this case to demonstrate the girl’s passivity, which she identifies as typical of early adolescence:

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<sup>47</sup> 969 S.W.2d 865 (Mo. 1998).

<sup>48</sup> See *Regulating Consensual Sex*, *supra* note 15, at 721–23.

<sup>49</sup> See *id.* (excerpting the facts from the appellate court’s opinion).

<sup>50</sup> See *id.* at 722.

<sup>51</sup> See *id.* at 723.

<sup>52</sup> 668 So. 2d 639 (Fla. Dist. Ct. App. 1996).

<sup>53</sup> *Id.* at 639–41.

<sup>54</sup> *Regulating Consensual Sex*, *supra* note 15, at 724.

<sup>55</sup> *Id.* at 724.

The extent to which she was inclined to confuse male sexual attention with true affection, her willingness to consent to intercourse in order to honor that male attention, and her failure to object more vociferously to conduct that was no longer desired all reflect her relative youth and powerlessness. In this case, her age-appropriate naiveté rendered this victim legally rapable.<sup>56</sup>

#### d. Silence

Oberman presents the case of *State v. Jason B.*,<sup>57</sup> in which a sixteen-year-old football player gave another football player and a fourteen-year-old girl a ride home. While taking the other player home, the boys made sexual comments about the girl, and the defendant said he “intended to have the [girl] perform oral sex on him.”<sup>58</sup> After dropping off the friend, the defendant drove the girl to an isolated part of a cemetery, parked the car and unzipped his pants. The victim testified that he forced her to commit fellatio upon him, but the trial court found the state failed to prove the element of compulsion.<sup>59</sup> The trial court found the defendant guilty of second degree sexual assault, and the appellate court upheld his adjudication.<sup>60</sup>

Oberman points to this case as an example of how a silent victim may find herself in circumstances that escalate beyond her control.<sup>61</sup> Oberman suggests that the girl’s silence in the car may have been due to discomfort with the situation or fear of the boys.<sup>62</sup> She states the victim’s passivity was “nothing other than her age and gender-appropriate behavior.”<sup>63</sup>

### 3. *The Prosecutorial Dilemma*

After setting forth two baseline facts—that every sexual act between teenagers is a crime and that in many such cases, the girl’s consent is not meaningful—Oberman asserts that this gives rise to a prosecutorial di-

<sup>56</sup> *Id.* at 725–26.

<sup>57</sup> 729 A.2d 760 (Conn. 1999).

<sup>58</sup> See *Regulating Consensual Sex*, *supra* note 15, at 727 (quoting *Jason B.*, 729 A.2d 765).

<sup>59</sup> 729 A.2d at 765.

<sup>60</sup> *Id.* at 764.

<sup>61</sup> See *Regulating Consensual Sex*, *supra* note 15, at 728. Oberman apparently presumes the victim was silent. The court’s recitation of facts is meager, stating only that the victim testified at trial that the defendant “forced her to perform fellatio.” 729 A.2d at 765. There is no indication in the court’s opinion as to what exactly the victim said or did not say.

<sup>62</sup> See *Regulating Consensual Sex*, *supra* note 15, at 727–28.

<sup>63</sup> *Id.*

lemma: Given the rate of illegal sex in the United States, what can be done to enforce the existing law?

Oberman asserts that the criminal justice system has ignored the problem for many years and that there needs to be a system for determining which cases to prosecute. She states:

Contemporary society's relatively promiscuous climate makes it extremely difficult to articulate the appropriate role for the criminal justice system in approaching adolescent sexual interactions. It is unimaginable that statutory rape laws could be fully enforced. And yet, if they are to be enforced selectively, which cases most merit punishment?<sup>64</sup>

In summary, Oberman posits two facts that give rise to a dilemma. First, the law of statutory rape in the United States prohibits any sexual activity between teenagers. Second, because numerous societal factors make it difficult for girls to meaningfully agree to sexual activity, illegal sex between teenage boys and girls represents a massive national problem. The resulting dilemma is how prosecutors can prioritize all of these cases of statutory rape for punishment. Oberman next summarizes how she perceives cases of statutory rape are currently prioritized and argues that these strategies are ineffective.

#### B. PERCEPTIONS OF HOW PROSECUTORS PRIORITIZE

Oberman states that contemporary solutions addressing problems of statutory rape are ill-advised or ineffective.<sup>65</sup> She identifies three current approaches that represent the modern approach to dealing with statutory rape.

First, she argues that cases involving teenage pregnancy are given top priority for prosecution. Without question, the problem of teen pregnancy was a central concern at the national level and in a few states in the 1990s.<sup>66</sup> In welfare reform legislation enacted in 1996, the United States Congress determined that the number of women receiving public assistance could be reduced if they stopped having babies at a young

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<sup>64</sup> *Id.* at 706; *see also id.* at 704 ("for many years, a large number of adolescents have engaged in illicit sexual conduct, and . . . the criminal justice system has looked the other way"); *id.* at 754 ("[T]he problem with overly broad statutory rape laws in an era in which a large portion of teens are sexually active lies in establishing meaningful enforcement guidelines.").

<sup>65</sup> *See id.* at 752 (stating that contemporary enforcement patterns leave "an entire realm of victims wholly unprotected").

<sup>66</sup> *See id.* at 734-38.

age.<sup>67</sup> Since sex between adults and minors is a crime across the country, Congress directed the states to "aggressively enforce" statutory rape laws.<sup>68</sup> Legislators reasoned that if states would enforce these laws, older men would stop getting young girls pregnant, who would then stop having babies, who would then not need public assistance; and ultimately, the dollars flowing from the federal treasury would be reduced.<sup>69</sup> Oberman—along with other legal commentators—objects to this legislation.<sup>70</sup>

Second, Oberman argues that prosecutors pursue only the most easily identified cases. The first type of easily identified cases are those in which health care providers and state agencies are required to report suspected child abuse. In line with the pregnancy prevention rationale, some states have encouraged or mandated certain agencies that interact with children to report a suspected crime when they encounter pregnant teenagers.<sup>71</sup> Thus, when a teenage girl applies for public assistance or seeks health care for pregnancy, the state agency or health care provider must report the interaction to law enforcement officials.

The second type of easily identified cases that are more likely to be pursued than cases involving voluntary teenage sex are those concerning large age differences or clear exploitation.<sup>72</sup> Oberman calls this the "that's sick" test and identifies it as the most common mechanism for determining which cases to prosecute. Within this category of cases, she identifies "incestuous or quasi-incestuous encounters, relationships between young people and those in a position of trust or authority, and sexual activity between young people and significantly older partners."<sup>73</sup> To support her assertion, she examines a few state laws and surveys appellate cases to conclude that cases involving substantially older perpetrators, family members, and the like are, indeed, more likely to be prosecuted than cases involving voluntary sex between teenagers.<sup>74</sup>

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<sup>67</sup> See The Personal Responsibility, Work Opportunity, and Medicaid Restructuring Act of 1996, Pub. L. No. 104-193, § 906, 110 Stat. 2105, 2349-50 (1996) (codified at 42 U.S.C. § 14016).

<sup>68</sup> *Id.*

<sup>69</sup> As stated by Senator Lieberman: "In examining [the problems of teen pregnancy and statutory rape], we answered two necessary questions: First, who is on welfare? Second, how did they get there?" 141 CONG. REC. S8419 (July 22, 1996).

<sup>70</sup> See *Regulating Consensual Sex*, *supra* note 15, at 737-38. For a thorough critique of the pregnancy prevention rationale, see Hollenberg, *supra* note 11.

<sup>71</sup> See *Regulating Consensual Sex*, *supra* note 15, at 741 (citing California as an example).

<sup>72</sup> See *id.* at 750 (contrasting cases of 'consensual sexual relationships' between peers with cases involving older perpetrators).

<sup>73</sup> See *id.* at 744.

<sup>74</sup> See *id.* at 746-51 (finding that eighty-one percent of national cases and ninety-one percent of Illinois cases constituted "overreaching" or an age span of ten or more years).

Although she appears to support the practice of treating serious cases seriously,<sup>75</sup> she claims that focusing on the “sick” cases “turns a blind eye to the coercion and abuse that may infect sexual encounters among peers.”<sup>76</sup> The result is that by failing to prosecute all cases of sex between teenagers, prosecutors are “reinterpreting and narrowing the scope” of statutory rape laws.<sup>77</sup> In other words, by focusing only on the serious “sick” cases, prosecutors ignore an entire universe of cases of illegal sex between juveniles.<sup>78</sup>

After setting out her view of the problem and the failures of the criminal justice system to respond to the problem, she concludes with a dismal assessment that “[r]ead together, these three enforcement strategies leave an entire realm of victims wholly unprotected.”<sup>79</sup> Then, she turns her attention to strategies for responding to the problem in a comprehensive manner.

### C. THE PROPOSED REFORM

#### 1. *Co-opt Existing Law*

Oberman asserts that teenagers are engaging in illicit sex in staggering numbers, that the criminal law as currently written prohibits this sex, and that prosecutors are not using the law to protect girls:

On some occasions, a girl may consent to sex which is exploitative, degrading, demeaning, and harmful to her. But the law does not recognize it as rape. The harm which results from a minor's bad decision in a sexual encounter may be infinitely more damaging to her than a bad business deal. Yet, the law, as presently construed, does not protect minors from the harmful consequences of their attempts at adult sexual behavior.<sup>80</sup>

By the phrase “as presently construed,” she apparently means that, even though the law is clear that teenagers under a certain age are per se incapable of consenting to sex, the law is not being used to punish instances of “exploitative, degrading, and demeaning” sex.<sup>81</sup> Because she construes the law as throwing such a wide net that it captures all voluntary sexual activity by teenagers, she argues that the central problem is

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<sup>75</sup> See *id.* at 751.

<sup>76</sup> See *id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 752.

<sup>80</sup> *Turning Girls into Women*, *supra* note 15, at 71.

<sup>81</sup> *Id.*

one of enforcement. That is, girls are not adequately protected because the wrong criteria are being used for enforcing existing law.<sup>82</sup>

In spite of her view that the law fails to protect minors who engage in sexual activity, her primary recommendation is that the substantive criminal law *not* be fundamentally changed. In fact, she goes through in some detail other reform proposals (such as lowering the age of consent and abuse of a position of trust as a proxy and setting clear age differentials) and rejects each of these as an incomplete means for improving the plight of adolescent girls.<sup>83</sup> She argues that reform proposals that focus on age differentials or “overreaching” are problematic in that they impose upon statutory rape prosecutions all the problems of adult acquaintance rape cases.<sup>84</sup> Ultimately, she concludes that the best solution is to retain the law in its current form:

[S]tatutory rape laws emerge as an important tool for prosecutors. Prosecutors may be reluctant to charge the acquaintance rapist with forcible rape and risk losing the case because of society’s tendency to blame the victim. Rather, the prosecutor may charge the rapist with statutory rape, (wherein the only required proof is that there was sexual contact with an underage victim. . .), and thus be assured of a conviction. Statutory rape laws therefore provide a *de facto* stop gap, permitting the law to punish those who commit the crime of rape, but who might escape punishment because of deep-seated societal norms that undermine convictions.<sup>85</sup>

Oberman criticizes statutorily enacted objective criteria such as age differentials or abuse of a position of authority in determining which cases to pursue,<sup>86</sup> arguing instead that prosecutors should use the discretion afforded them by a strict liability crime to identify and prosecute cases of statutory rape.<sup>87</sup>

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<sup>82</sup> See *Regulating Consensual Sex*, *supra* note 15, at 754 (“[T]he problem with overly broad statutory rape laws in an era in which a large portion of teens are sexually active lies in establishing meaningful enforcement guidelines.”).

<sup>83</sup> See *id.* at 758–75. For example, she evaluates and rejects the proposals of Schulhofer, *id.* at 764–65, Kitrosser, *id.* at 765–67, and Oliveri, *id.* at 759–60. See SCHULHOFER, *supra* note 8; Kitrosser, *supra* note 12; and Oliveri, *supra* note 11.

<sup>84</sup> See *Regulating Consensual Sex*, *supra* note 15, at 752.

<sup>85</sup> *Girls in the Master’s House*, *supra* note 15, at 820–21; see also *Regulating Consensual Sex*, *supra* note 15, at 778 (“I believe the better approach to the dilemma lies in enlisting the law as a tool to be used by adolescents themselves as they navigate their sexual development.”).

<sup>86</sup> See *Regulating Consensual Sex*, *supra* note 15, at 768–71.

<sup>87</sup> *Girls in the Master’s House*, *supra* note 15, at 825.

Occasionally, Oberman discusses definitional matters. For example, in *Girls in the Master's House* she states: "These laws must be reconfigured from their cores, beginning with a central definition of coercion and exploitation."<sup>88</sup> She likewise visits the definition of coercion in *Turning Girls into Women*:

Currently, the law prohibits intercourse with minors by virtue of age-range, and proximity of family relation. A revised statute could identify additional sexual scenarios as presumptively suspect or even illegal by definition. For example, legislators could enact a rule barring sexual encounters between several males and one minor female. Likewise, the law could require greater scrutiny of evidence that a minor girl consented to sex. For example, courts could require a critical examination of the method by which consent was procured, disallowing forms of behavior deemed coercive.<sup>89</sup>

On these occasions, however, Oberman does not attempt to define coercive behavior or specify the standard the court would use in scrutinizing the evidence.<sup>90</sup> In the end, Oberman's call to reconfigure the law is not a call to redefine consent or otherwise work to identify objective factors that demonstrate a lack of consent. Rather, she argues that prosecutors should employ traditional strict liability sex crime statutes to prosecute sex between juveniles.

## 2. *Lower the Level of Punishment*

After establishing her baseline call for active use of statutory rape laws, Oberman proposes reconsidering overly harsh sentences for certain offenders. She argues that when juveniles are subject to incarceration for statutory rape, they are less likely to be prosecuted, which teaches them that the behavior is acceptable, and in so doing perpetuates the cycle of unacceptable behavior.<sup>91</sup> For this reason, she argues that instead of using incarceration as the primary punishment, prosecutors and judges should "employ the broad range of options available under the law in crafting punishments for those guilty of statutory rape."<sup>92</sup> The focus of such a system primarily is on rehabilitation, with the use of psychological eval-

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<sup>88</sup> See *id.* at 825.

<sup>89</sup> See *Turning Girls into Women*, *supra* note 15, at 75.

<sup>90</sup> In *Regulating Consensual Sex*, wherein Oberman makes specific reform proposals, she makes no mention of the need to redefine coercion. In *Girls in the Master's House*, Oberman identifies definitional matters as important, but she makes no specific recommendations. See *Girls in the Master's House*, *supra* note 15, at 825.

<sup>91</sup> See *Regulating Consensual Sex*, *supra* note 15, at 775.

<sup>92</sup> See *id.* at 776.



uations to identify "a predatory sex offender, as opposed to one who is attracted to a particular underage teen."<sup>93</sup>

She states that this approach demonstrates "a realistic understanding of adolescent sexuality."<sup>94</sup> In her words, "it is important to acknowledge that mistakes will occur."<sup>95</sup> Since they have engaged in unacceptable behavior, these boys need to be punished. However, because their actions do not rise to the level of outright coercion, they should not receive the full impact of the law by being labeled as sex offenders the rest of their lives. Thus, existing law may be too harsh "to the extent that the law ignores the learning curve at work in adolescent sexual encounters,"<sup>96</sup> but some punishment should be imposed so as not to condone the behavior.<sup>97</sup>

### 3. *Empower Victims*

After arguing that existing statutory frameworks should be used more aggressively, Oberman proposes certain statutory reforms, the first of which is that an age of consent of at least sixteen be retained.<sup>98</sup> The second component of Oberman's statutory reform is to empower victims by involving them more directly in charging and sentencing decisions.<sup>99</sup> In particular, she argues that for a first offense, the victim should decide whether to allow the perpetrator to receive a suspended sentence.<sup>100</sup> Essentially, this suggestion amounts to implementing a formalized system of deferred prosecution.<sup>101</sup> Thus, if the defendant successfully complies with counseling, community service, or other conditions imposed by a court, the criminal charges are dismissed. While Oberman recommends that the victim make the decision, she states that if the victim does not make this decision, the prosecutor should.<sup>102</sup> Oberman suggests an exception for cases involving aggravating factors such as abuse of a position of authority or very young victims; in these cases, victim cooperation would not be dispositive.<sup>103</sup>

It is important to note that she is not recommending simply that the victim be heard, but that the victim's recommendation be determinative.

<sup>93</sup> See *id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 777.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 778.

<sup>99</sup> See *id.* at 778–79. For a discussion of ambiguity concerning the scope of her proposal, see *infra* notes 211–15 and accompanying text.

<sup>100</sup> See *id.* at 778.

<sup>101</sup> For a discussion of deferred prosecution (also called pre-trial intervention and pre-trial diversion), see *United States v. Flowers*, 983 F. Supp. 159, 161–65 (E.D.N.Y. 1997).

<sup>102</sup> See *Regulating Consensual Sex*, *supra* note 15, at 778–79.

<sup>103</sup> See *id.* at 779.

For example, in the context of discussing the impact her reform would have on health care providers, she states: “[The reform] would alleviate the pressure toward mandated reporting by health care and social service providers, in that the young person would be permitted to decide for herself whether the relationship in which she was engaged was consensual.”<sup>104</sup> Elsewhere, she proposes reform of statutory rape laws so they can be “a tool to be used by adolescents themselves as they navigate their sexual development.”<sup>105</sup> Thus, her call is for victim involvement far beyond that provided in victims’ rights legislation.

Finally, Oberman recommends that laws call for prosecutors and courts to use victim impact statements and provide victim assistance.<sup>106</sup> She further supports the use of long statutes of limitation, arguing that it may be years before many girls are empowered to disclose a coercive relationship.<sup>107</sup>

Oberman argues that these recommendations are helpful for several reasons. First, by enlisting victim cooperation, they eliminate the possibility that prosecution of truly wanted, voluntary sex will take place.<sup>108</sup> Second, she contends this approach will eliminate the need to force health care providers and others to report abuse.<sup>109</sup> Third, she argues that her approach will avoid imposing unnecessarily harsh sentences in an era of sex offender registration and three strikes laws.<sup>110</sup>

## II. A CRITIQUE OF THE RECONFIGURATION

Oberman makes several challenging and thought-provoking recommendations that deserve serious consideration. Because the premises upon which she bases her arguments are critical to her proposed solution, I will first examine the validity of these underlying assumptions.

### A. MISTAKEN ASSUMPTIONS

#### 1. *The Law and Its Application*

In *Regulating Consensual Sex*, Oberman opens with an attention-grabbing assertion: Each year, there are *at least* 7.5 million incidents of statutory rape in the United States involving teenagers under the age of sixteen.<sup>111</sup> Oberman calculates this figure by first asserting that “each

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<sup>104</sup> *Id.* at 781.

<sup>105</sup> *Id.* at 778.

<sup>106</sup> *See id.* at 781–82.

<sup>107</sup> *See id.* at 782–83.

<sup>108</sup> *See id.* at 781.

<sup>109</sup> *See id.*

<sup>110</sup> *See id.* at 781–82.

<sup>111</sup> The entire paragraph reads:

A 1995 study revealed that, by the age of sixteen, 50% of U.S. teenagers have had sexual intercourse. This result, which echoes the findings of many similar studies,

incident of sexual intercourse among this population is illicit," and then concluding that data on teenage sexual activity.<sup>112</sup>

Though this is indeed a staggering statistic, it is not accurate. Most significantly, this assertion represents an incorrect statement of the law. A review of state statutes demonstrates that in most states it is not a crime for two teenagers of comparable age to engage in an act of voluntary sexual intercourse.<sup>113</sup> That is, in thirty-eight states most voluntary sexual activity between teenagers of comparable age is not "statutory rape."<sup>114</sup>

States use a variety of mechanisms to exclude voluntary sex between teenagers from the reach of the criminal law. In many states the law sets a minimum age a defendant must have attained before an offense exists; typically, this age falls somewhere between seventeen and twenty-one.<sup>115</sup> In other states, a crime is committed only if the defendant is a specified number of years older than the victim—four years is a common age span requirement.<sup>116</sup> And yet other states have created

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reveals a serious problem for criminal justice. The age of consent to sexual contact under the vast majority of state statutes is sixteen or older, and thus, each incident of sexual intercourse among this population is illicit—each constitutes a separate instance of statutory rape. The numbers are staggering. Utilizing U.S. Census Bureau figures, the 50% figure implies that there are *at least* 7.5 million incidents of statutory rape per year.

*Id.* at 703 (emphasis in original, citations omitted).

<sup>112</sup> *Id.* at 703–04.

<sup>113</sup> In a footnote Oberman states: "It is also worth noting that the definition of statutory rape varies across jurisdictions." *Regulating Consensual Sex*, *supra* note 15, at 704 n.3. However, nowhere does she explain that these definitions entirely undermine her basic assertion, thus rendering the caveat rather hollow.

<sup>114</sup> See Appendix B for a listing of these states. See *infra* notes 270–98 and accompanying text for a more precise explanation of how the state statutes break down.

<sup>115</sup> See ARK. CODE ANN. § 5-14-106 (Michie 1997) (twenty years old); IND. CODE ANN. § 35-42-4-9 (West 1998) (eighteen years old); KY. REV. STAT. ANN. §§ 510.050, 510.060 (Lexis 1999) (eighteen and twenty-one years old, depending on age of the victim); MD. CRIM. L. CODE ANN. § 3-307 (Michie 2002) (twenty-one years old); MO. REV. STAT. § 566.034 (West Supp. 2002) (twenty-one years old); NEB. REV. STAT. §§ 28-319, 28-320.01 (1995 & Supp. 2000) (nineteen years old); NEV. REV. STAT. § 200.364(3) (Lexis 2001) (eighteen years old); N.Y. PENAL LAW §§ 130.25, 130.40 (Supp. 2001) (defendant twenty-one when victim is under seventeen); N.Y. PENAL LAW §§ 130.30, 130.45 (Supp. 2001) (defendant eighteen when victim is under fifteen); N.D. CENT. CODE § 12.1-20-05 (Michie 1997) (an adult); OHIO REV. CODE ANN. § 2907.04 (Supp. 2001) (eighteen years old); OKLA. STAT. ANN. tit. 21, § 1112 (West 1983) (eighteen years old); R.I. GEN. LAWS § 11-37-6 (Lexis 2000) (eighteen years old); VA. CODE ANN. § 18.2-371 (Michie 1996) (eighteen years old).

<sup>116</sup> See ALA. CODE §§ 13A-6-62(a)(1) (Lexis Supp. 2001) (two years); ALASKA STAT. §§ 11.41.436(a)(1) (Michie 1996) (three years); ARIZ. REV. STAT. § 13-1407(F) (West 2001) (two years); COLO. REV. STAT. § 18-3-402 (2001) (four years); CONN. GEN. STAT. § 53a-71 (West 2001) (two years); DEL. CODE ANN. tit. 11, § 762(d) (Michie 2001) (four years); HAW. REV. STAT. ANN. § 707-730 (Lexis Supp. 2002) (five years); IOWA CODE § 709.4(2)(c)(4) (West Supp. 2002) (four years); LA. REV. STAT. ANN. §§ 14:80(A), 14:81.2(A) (West Supp. 2001) (two years); ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 2001) (5 years); MD. CRIM. L. CODE ANN. § 3-308 (Michie 2002) (four years); MINN. STAT. § 609.344 (West Supp.

some combination of a minimum defendant's age and age differentials.<sup>117</sup>

Indeed, only twelve states have the type of statute that Oberman presumes to be the norm across the country.<sup>118</sup> In these twelve states, there is no limitation on the age of the defendant and no requirement of an age differential; thus, voluntary sexual activity between teenagers is a crime. Even in these states, though, the laws often lower the severity level of the offense when a small age differential exists.<sup>119</sup> Furthermore, in four of these twelve states, the offense is reduced to misdemeanor status, taking it outside the common understanding of the term "statutory rape" altogether.<sup>120</sup>

Thus, because the vast majority of voluntary sexual activity between teenagers under the age of sixteen is not illicit and does not amount to "statutory rape," Oberman's premise that prosecutors must sort through millions of cases of illegal voluntary sexual activity is factually incorrect. The criminal justice system will only consider those cases involving co-

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2002) (two years); MISS. CODE ANN. § 97-3-95 (Lexis 2000) (three years if the victim is aged fourteen or fifteen; two years if the victim is under fourteen); N.J. STAT. ANN. § 2C:14-2 (West Supp. 2002) (four years); N.M. STAT. ANN. § 30-9-11(F) (Michie Supp. 2002) (four years); N.C. GEN. STAT. § 14-27.7A (1993 & Supp. 1996) (four and six years); OR. REV. STAT. § 163.345 (2001) (three years); 18 PA. CONS. STAT. § 3122.1 (2001) (four years); S.D. CODIFIED LAWS § 22-22-1(5) (Lexis Supp. 2002) (three years); TENN. CODE ANN. § 39-13-506 (2001) (four years); TEX. PENAL CODE ANN. § 22.011 (West Supp. 2002) (three years); UTAH CODE ANN. §§ 76-5-401.1, 76-5-401.2 (2001) (7 & 10 years); WASH. REV. CODE § 9A.44.079 (West 2000) (two years); W. VA. CODE § 61-8B-5 (1992) (four years); WYO. STAT. ANN. § 6-2-304 (Michie 2001) (four years).

<sup>117</sup> See ALA. CODE § 13A-6-62(a)(1) (Lexis Supp. 2001); ALASKA STAT. § 11.41.436(a)(1) (Michie 1996); ARIZ. REV. STAT. § 13-1407(F) (West 2001); LA. REV. STAT. ANN. § 14:80(A) (West Supp. 2001); ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 2001); MD. CRIM. L. CODE ANN. § 3-307 (Michie 2002); MISS. CODE ANN. § 97-3-65 (Lexis 2000); N.M. STAT. ANN. § 30-9-11(F) (Michie Supp. 2002); OR. REV. STAT. §§ 163.345, 163.355, 163.435, & 163.445 (2001); W. VA. CODE §§ 61-8B-5, 61-8B-9 (Lexis 2000).

<sup>118</sup> See CAL. PENAL CODE §§ 261.5, 289(h) (West Supp. 2001); FLA. STAT. ANN. § 800.04(4)(a) (West Supp. 2002); GA. CODE ANN. § 16-6-3 (Lexis 1999); IDAHO CODE § 18-1508 (Michie 1997); 720 ILL. COMP. STAT. ANN. § 5/12-15(b) (West Supp. 2002); KAN. STAT. ANN. § 21-3522 (Supp. 2001); MASS. GEN. LAWS ch. 265, § 23 (West 2000); MICH. COMP. LAWS § 750.520d (West Supp. 2002); MONT. CODE ANN. § 45-5-503 (1999); N.H. REV. STAT. ANN. § 632-A:3(II) (Lexis Supp. 2002); S.C. CODE ANN. § 16-3-655(3) (1985); WIS. STAT. ANN. §§ 948.02, 948.09 (West 1996).

<sup>119</sup> See, e.g., CAL. PENAL CODE §§ 261.5, 289 (West 2001); GA. CODE ANN. § 16-6-3 (2001); VA. CODE ANN. § 18.2-63 (Michie 2001).

<sup>120</sup> See CAL. PENAL CODE § 261.5(b) (West Supp. 2002) (misdemeanor if the defendant is within three years of age); CAL. PENAL CODE § 289(h) (West Supp. 2002) (misdemeanor if victim is under eighteen); GA. CODE ANN. § 16-6-3(b) (Lexis 1999) (misdemeanor if victim is fourteen or fifteen and the age difference is less than three years); 720 ILL. COMP. STAT. ANN. § 5/12-15(b) (West Supp. 2002) (misdemeanor if the accused is under seventeen or if the victim is thirteen to sixteen and there is less than a five year age differential); WIS. STAT. ANN. § 948.09 (West 1996) (misdemeanor if the victim is aged sixteen or older). The term "statutory rape" implies a felony offense—the offense being the statutory version of the common law felony rape. See Phipps, *supra* note 14, at 10–11.

ercion, significant age disparity, or the like because in most states voluntary sex between teenagers of comparable ages is not a violation of the criminal law.

Oberman attempts to further quantify the scope of the problem by claiming 7.5 million incidents of statutory rape occur each year. This figure does not withstand scrutiny. According to the 1990 Census, there were 9,903,716 teenagers in the United States aged thirteen, fourteen, and fifteen.<sup>121</sup> Because girls become sexually active at different ages than boys, the data must be broken down into sexes, thus showing there were 4,829,274 girls aged thirteen, fourteen, or fifteen in 1990.<sup>122</sup> Social scientists estimate that approximately forty-three percent of girls under the age of sixteen have engaged in sexual intercourse.<sup>123</sup> Therefore, of the 4.8 million girls counted in the 1990 Census, approximately two million are likely to have engaged in at least one act of sexual intercourse.

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<sup>121</sup> See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, UNITED STATES 17, tbl.13 (1992). This report indicates that in 1990, the Census Bureau counted 3,339,000 thirteen-year-olds; 3,243,107 fourteen-year-olds; 3,321,609 fifteen-year-olds; and 3,304,890 sixteen-year-olds. I have been unable to reconstruct Oberman's assertion that 1990 U.S. Census Bureau data show there were fifteen million U.S. residents "between the ages of 13 and 16." See *Regulating Consensual Sex*, *supra* note 15, at 703-04 & 704 n.3. If Oberman intends the fifteen million figure to be inclusive of both thirteen- and sixteen-year-olds, the data from the 1990 Census adds up to 13,208,606. However, given that she asserts in the very same paragraph that the age of consent in most states is sixteen, then logically sixteen-year-olds should not be included in this figure. Thus, the Census Bureau data show that there were 9,903,716 teenagers aged thirteen, fourteen, and fifteen in the United States in 1990.

The 2000 Census reports 12,082,485 individuals in these age categories. See U.S. Census Bureau, Census 2000 Summary File 1, Matrix PCT12, Table QT-P2, available at <http://factfinder.census.gov>.

<sup>122</sup> BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, UNITED STATES 17, tbl.13 (1992).

<sup>123</sup> See Centers for Disease Control, U.S. Dep't of Health & Human Services, *Youth Risk Behavior Surveillance—United States, 1999*, MORBIDITY AND MORTALITY WEEKLY REPORT, Vol. 49 (June 9, 2000), at 75 (Table 30). The Centers for Disease Control (CDC) reports that forty-three percent of tenth grade girls and fifty-one percent of tenth-grade boys say they have engaged in sexual intercourse. The prior CDC report provides nearly identical numbers for girls, though a smaller number of boys who reported engaging in sexual intercourse by the tenth grade. Centers for Disease Control, U.S. Dep't of Health & Human Services, *Youth Risk Behavior Surveillance—United States, 1997*, MORBIDITY AND MORTALITY WEEKLY REPORT, Vol. 47 (Aug. 14, 1998), at 70 (Table 26) (43.5 percent of tenth-grade girls and 41.7 percent of tenth-grade boys reported having engaged in sexual intercourse). Since nearly all teenagers reach their sixteenth birthday during the tenth grade, these numbers fairly reflect a reasonable estimate of the percentage of children under the age of sixteen who have engaged in sexual intercourse.

Oberman asserts that by age sixteen, fifty percent of U.S. teenagers are engaging in sexual intercourse. See *Regulating Consensual Sex*, *supra* note 15, at 703 (citing Charles W. Warren et al., *Sexual Behavior Among U.S. High School Students, 1990-1995*, 30 FAM. PLAN. PERSP. 170 (1998)). However, the Warren et al. study cited by Oberman lumps together all high school students (grades nine through twelve), and does not break down the data by age category. Thus, it is not the best source for this statistic.

However, social science research also indicates that only about seven percent of girls aged fifteen to seventeen engage in sex with males six or more years older than the girl—an age differential that is nearly certain to constitute a criminal offense under the laws of most states (for girls under sixteen).<sup>124</sup> Assuming that the seven percent figure holds for thirteen- and fourteen-year-olds,<sup>125</sup> one can estimate that each year 140,000 girls (seven percent of two million) in the United States aged thirteen, fourteen, or fifteen engage in sexual activity with someone more than five years older. In other words, the above contortions result in a figure of around 140,000 girls under the age of sixteen who are victims of statutory rape each year in the United States.<sup>126</sup>

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<sup>124</sup> See Jacqueline E. Darroch et al., *Age Difference Between Sexual Partners in the United States*, 31 FAM. PLAN. PERSP. 160 (1999). The Alan Guttmacher Institute reports that, among sexually active girls aged fifteen to seventeen, sixty-four percent of the girls' sexual partners were within two years of the girls' age, twenty-nine percent were within three to five years, and seven percent of the girls had partners six or more years older. *Id.* at 163. Compare Laura Duberstein Lindberg et al., *Age Differences Between Minors Who Give Birth and Their Adult Partners*, 29 FAM. PLAN. PERSP. 61 (1997) (twenty-seven percent of mothers aged fifteen to seventeen reported having partners five or more years older).

<sup>125</sup> This assumption may or may not be correct. One study found that nearly thirty percent of male partners of thirteen- and fourteen-year-old mothers were aged twenty or older. See Don J. Taylor et al., *Demographic Characteristics in Adult Paternity for First Births to Adolescents Under 15 Years of Age*, 24 J. ADOLESCENT HEALTH 251 (1999). Taylor et al. examined all birth records in California from 1993–1995 and reported that men aged twenty or above were the fathers in 26.7 percent of cases of pregnancy of girls under the age of fifteen. Although several factors make this study difficult to generalize (forty-two percent of the girls studied were Hispanic, among whom the percentage of very young pregnancies was four times the rate of whites; about one-fourth of the total sample did not provide an age for the fathers; the study examined the limited population of girls who gave birth, rather than examining the entire population of sexually active girls), it suggests the number may be higher than seven percent. See also M. Joycelyn Elders & Alexa E. Albert, *Adolescent Pregnancy and Sexual Abuse*, 280 JAMA 648 (1998) ("Research suggests that the younger the mother, the greater the partner age gap, with men on average 4.2 years older than senior high school mothers and 6.7 years older than junior high school mothers.").

Yet another survey found that only twelve percent of male partners to girls aged thirteen to fifteen in Vermont were five or more years older than the girl. Importantly, this figure includes all sexually active girls, not just those who became pregnant. See also Harold Leitenberg & Heidi Saltzman, *A Statewide Survey of Age at First Intercourse for Adolescent Females and Age of Their Male Partners: Relation to Other Risk Behaviors and Statutory Rape Implications*, 29 ARCHIVES OF SEXUAL BEHAVIOR 203, 208 (2000).

<sup>126</sup> In order to be more accurate (or perhaps simply to be less inaccurate), this number would need to be increased by some unknown (and largely unknowable) percentage to reflect the twelve states in which it is a crime regardless of the age of the parties, and then adjusted again to reflect the fact that some of these states are very populous (e.g., California, Illinois). It would need to be altered further to reflect the states with an age differential of less than five years. And, of course, all of these numbers rely upon accurate underlying data from multiple social science studies, each of which has its own potential methodological flaws. See, e.g., Robert T. Michael, *Abortion Decisions in the United States*, in SEX, LOVE, AND HEALTH IN AMERICA: PRIVATE CHOICES AND PUBLIC POLICIES 377, 430–35 (Edward O. Laumann & Robert T. Michael, eds. 2001). Michael critiques data from the Alan Guttmacher Institute (AGI) in a different context, ultimately concluding that there is no reason to doubt the accuracy of the AGI statistics. However, the Michael critique demonstrates the ways in which social science

One could go through the same exercise with the male population and come up with a comparable figure, but it should be clear that so many factors are either unknown (e.g., the number of teenagers in each age group whose sexual partners are substantially older) or too time consuming to be worth tracking down (e.g., exactly how each state's child sexual abuse laws play out) as to virtually guarantee the inaccuracy of this type of estimate. What is clear is that Oberman's figure of 7.5 million victims is hyperbolic and unsupportable as a representation of the incidence of statutory rape in the United States.

In contrast, readily available social science literature provides reasonable estimates of the prevalence of unwanted and non-voluntary sexual activity between teenagers. For example, Vogeltanz et al. asked a nationally representative sample of more than 1,000 women about childhood sexual experiences.<sup>127</sup> The researchers asked the women whether they experienced any unwanted sexual activity before age eighteen,<sup>128</sup> and they found that approximately twenty percent of the women reported some unwanted sexual experiences as children.<sup>129</sup> Of these, twenty-nine percent of extrafamilial abusers were boyfriends, and an additional twelve percent were male playmates.<sup>130</sup>

Likewise, Abma et al. asked women to rate on a scale of one to ten the degree of wantedness of their first sexual intercourse experience (one meaning "you really didn't want it to happen at that time" and ten meaning "you really wanted it to happen").<sup>131</sup> The researchers also asked the women whether the intercourse was voluntary. While ninety-one percent of women reported that their first intercourse was voluntary, approximately one-quarter of them gave a score of four or lower indicating that

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data is subject to scrutiny and shows how a slight change in data can have significant policy implications. AGI is the publisher of the journal *Family Planning Perspectives*, the source of some of the data presented above.

<sup>127</sup> See Nancy D. Vogeltanz et al., *Prevalence and Risk Factors for Childhood Sexual Abuse in Women: National Survey Findings*, 23 CHILD ABUSE & NEGLECT 579, 585 (1999).

<sup>128</sup> Specifically, the researchers asked about:

(a) any intrafamilial sexual activity before age 18 and that was unwanted or that involved a family member 5 or more years older than the respondent; and (b) any extrafamilial sexual activity that occurred before age 18 and was unwanted, or that occurred before age 13 and involved another person 5 or more years older than the respondent.

*Id.* at 582.

<sup>129</sup> *Id.* at 583. Depending on the definition used and the method of analyzing the data, the researchers estimated a prevalence in their sample ranging from 17.3 percent to 24.0 percent.

<sup>130</sup> See *id.* at 585.

<sup>131</sup> See Joyce Abma et al., *Young Women's Degree of Control over First Intercourse: An Exploratory Analysis*, 30 FAM. PLAN. PERSP. 12 (1998). Oberman cites this study to support the assertion: "In their yearning for femininity, [girls] may become compliant and cooperative when pressured for sex." See *Girls in the Master's House*, *supra* note 15, at 820.

nearly one in four women did not want to engage in sex at that time.<sup>132</sup> Thus, from ten to twenty-five percent of women in this study reported their first intercourse in negative terms.

These are only two of the numerous studies that attempt to determine prevalence of unwanted childhood sexual experiences,<sup>133</sup> but they adequately demonstrate the scope of the problem. Although it is difficult to translate these studies into exact ages, relationships, and numbers for a given year,<sup>134</sup> the studies demonstrate that a substantial number of teenage girls in the United States are victims of non-voluntary sexual activity.

Oberman asserts that it is unimaginable to try to prosecute the more than 7.5 million incidents of statutory rape each year;<sup>135</sup> that the criminal justice system ignores the large numbers of juveniles engaging in illicit sexual conduct;<sup>136</sup> and that, given these numbers, an overwhelming problem is the prioritization of cases.<sup>137</sup> While there is no question that juvenile sexual activity is commonplace in the United States and that a disturbingly large percentage of this is unwanted or involuntary, Ober-

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<sup>132</sup> The terms "wanted/unwanted" are used in the social science literature to refer to a subjective state of mind of a participant. See Abma et al., *supra* note 131, at 12. See also Vogeltanz, *supra* note 126, at 582. Thus, the terms "wanted/unwanted" can encompass conduct ranging from forcible rape to first intercourse that a person later indicated they did not want. That is, the person agreed to (or did not object) to a sexual act, but when asked later, the person would say she or he did not desire the act at that time.

<sup>133</sup> See also Pamela I. Erickson & Andrea J. Rapkin, *Unwanted Sexual Experiences Among Middle and High School Youth*, 12 J. OF ADOLESCENT HEALTH 319 (1991) (noting that eighteen percent of sixth through twelfth graders reported experiencing unwanted sex; though many of these were abuse by an adult, a substantial number of girls reported having unwanted sex with a friend or boyfriend); Kristin Anderson Moore et al., *Nonvoluntary Sexual Activity Among Adolescents*, 21 FAM. PLAN. PERSP. 110 (1989); Diana E.H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133 (1983); Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572 (2001) (citing that between nine and 13.4 percent of girls under eighteen reported being subjected to sexual violence alone or a combination of sexual and physical violence in a dating relationship); Gail E. Wyatt, *The Sexual Abuse of African American and White American Women in Childhood*, 9 CHILD ABUSE & NEGLECT 507 (1985).

<sup>134</sup> Researcher David Finkelhor concludes that a reasonable summary of the literature indicates that approximately twenty percent of adult women report being sexually victimized as children. See David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, in 4 THE FUTURE OF CHILDREN 31, 42 (1994). Finkelhor estimates that approximately 500,000 children each year are victims of sexual abuse, but this calculation does not attempt to determine how many of these are victimized by a peer. *Id.* at 43. Finkelhor also provides a good review of the methodological problems in deriving accurate numbers. *Id.* at 32-42.

<sup>135</sup> *Regulating Consensual Sex*, *supra* note 15, at 704, 706.

<sup>136</sup> *Id.* at 704.

<sup>137</sup> *Id.* at 733.



man's assertions concerning the extent of criminal sexual activity between teenagers are unsupportable.<sup>138</sup>

## 2. *The Victims*

To demonstrate the dynamics of victimization, Oberman examines several shocking cases in which older boys engaged in sexually exploitive activity with younger girls. While these cases serve as dramatic illustrations of the problem of coercive sex between teenagers, many of the case studies also demonstrate that current law has a remedy for the wrongs committed.<sup>139</sup>

Consider *State v. Hemme*,<sup>140</sup> the case Oberman uses to demonstrate acquiescence by adolescent girls.<sup>141</sup> In reciting the facts, she describes it as a case of a nineteen-year-old male who engaged in multiple acts of oral sex with S.Q., a thirteen-year-old girl. What she fails to note is that the reported opinion discusses a fifteen-year-old victim as well—in fact, the issue on appeal is the joinder of the two cases.<sup>142</sup>

Just as with S.Q., Joshua Hemme repeatedly asked J.B., the fifteen-year-old, out for dates, and she consistently refused. Eventually, when he had an opportunity to be alone with her while she was babysitting, Hemme fondled J.B. and digitally penetrated her vagina. Three separate times she told him she did not want to have sexual intercourse with him. Twice she tried to get up to leave, and he pulled her back down.<sup>143</sup>

Hemme was charged with a nonconsensual offense<sup>144</sup> against the fifteen-year-old and two counts against the thirteen-year-old that did not

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<sup>138</sup> For a thorough and excellent discussion of the findings and the gaps in the social science literature, see LEVESQUE, *supra* note 1, at 60–72, 232–35.

<sup>139</sup> This is not to say that the system is without failure. Several of Oberman's examples, according to the facts as she presents them, demonstrate that crimes clearly occurred and yet were not prosecuted. See, e.g., *Regulating Consensual Sex*, *supra* note 15, at 779–20 (discussing a Chicago case in which law enforcement did not pursue allegations of clear abuse against eleven- and twelve-year-old girls). While inadequate enforcement of existing law is a separate problem, it does not in itself demonstrate a need to reform the underlying substantive law.

<sup>140</sup> 969 S.W.2d 865 (Mo. Ct. App. 1998).

<sup>141</sup> See *Regulating Consensual Sex*, *supra* note 15, at 721–23.

<sup>142</sup> *Hemme*, 969 S.W.2d at 865.

<sup>143</sup> *Id.* at 867–68.

<sup>144</sup> See *id.* at 866 (Mo. Ct. App. 1998) (citing MO. REV. STAT. § 566.070 (1994)). Section 566.070 defines the crime as: "A person commits the crime of deviate sexual assault if he has deviate sexual intercourse with another person knowing that he does so without that person's consent." *Id.*

require proof of nonconsent.<sup>145</sup> He was convicted on all charges and sentenced to a total of eleven years incarceration.<sup>146</sup>

While Oberman does not report the facts of the real fifteen-year-old victim, she uses *Hemme* to point out a hypothetical problem that could exist.<sup>147</sup> Discussing the thirteen-year-old victim, she speculates:

What is perhaps more interesting about the case is to consider the response it might have generated had these parties not been separated by an age difference of six years. Under Missouri law, this encounter would not have been criminal had the victim been age fourteen, rather than thirteen.<sup>148</sup>

However, Oberman fails to point out that the case *did in fact* involve an older victim—the fifteen-year-old—and that the state *did in fact* successfully prove that *Hemme* acted knowing that the victim had not consented to the sex act.<sup>149</sup> Moreover, *Hemme*'s treatment of both victims was highly similar: he pressured each to go out with him, he lured each into situations in which they were alone with him, and he ignored the pleas of each girl not to engage in sexual acts.<sup>150</sup> Thus, the statutory scheme worked both in regard to the younger victim protected by the strict liability provision and the older victim protected by the traditional rape statute (deviate sexual intercourse in this case).

Oberman also uses the case to support the assertion that "permitting statutory rape guilty pleas to substitute for acquaintance rape trials, undermines the seriousness of the offense of forced sex, and thus erodes the legitimacy of laws against rape."<sup>151</sup> She goes even further to claim, "Be-

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<sup>145</sup> See *Hemme*, 969 S.W.2d at 865–66 (Mo. Ct. App. 1998) (citing Mo. REV. STAT. § 566.032 (1994); Mo. REV. STAT. § 566.062 (1994)). Section 566.032 reads: "A person commits the crime of statutory rape in the first degree if he has sexual intercourse with another person who is less than fourteen years old." *Id.* Section 566.062 states: "A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years old." *Id.*

<sup>146</sup> *Hemme*, 969 S.W.2d 868 (seven years on the statutory rape charge and five years on the statutory sodomy charge to run concurrently and four years on the deviate sexual assault charge to run consecutively).

<sup>147</sup> See *Regulating Consensual Sex*, *supra* note 15, at 722–23.

<sup>148</sup> *Id.* at 722. She repeats these assertions in *Girls in the Master's House*, arguing that certain factors "point to societal norms that likely would undermine the chances that *Hemme* could be convicted for [a nonconsensual] rape. S.Q. likely would be blamed by a jury for her failure to object more vigorously to *Hemme*'s advances." *Girls in the Master's House*, *supra* note 15, at 819. While there is ample evidence that juries are reluctant to convict in acquaintance rape cases, *Hemme* goes against this trend since the jury in that case convicted him of forcible offenses against a victim even closer to his own age. *Hemme*, 969 S.W.2d 865.

<sup>149</sup> *Hemme* was convicted of deviate sexual assault for his acts with J.B. *Hemme*, 969 S.W.2d 865. See Mo. REV. STAT. § 566.070 (1994).

<sup>150</sup> *Hemme*, 969 S.W.2d at 867–68.

<sup>151</sup> *Girls in the Master's House*, *supra* note 15, at 822.

cause he was charged with statutory rape, rather than rape, the law *tacitly accepts that the sexual encounter between Hemme and S.Q. was consensual*, rather than forcible.”<sup>152</sup> While such an argument could be valid in a hypothetical situation, these criticisms are not applicable to *Hemme*. Not only did the case go to trial (rather than settle for a reduced plea), the two cases were joined, obviously showing to the jury that the defendant was a forcible rapist (which is certainly why he wanted the cases tried separately—thus the appeal). Moreover, Joshua Hemme received *longer* terms of incarceration for the “statutory” offenses than he did for the nonconsensual offenses,<sup>153</sup> which once again goes against Oberman’s assertion that the “statutory” offense “erodes the legitimacy of laws against rape.”<sup>154</sup> Contrary to Oberman’s assertions, the law as applied to this case did not tacitly accept the sexual encounter as consensual; rather, the law explicitly condemned Hemme’s acts as coercive and criminal.

When viewed in its entirety, *Hemme* demonstrates the type of coercive behavior often involved in cases of acquaintance rape. The defendant could be portrayed by a defense attorney as a “boyfriend,” but in fact he was a person who used force and coercion to subject younger girls to non-voluntary sex. Given that the case resulted in rape convictions with serious penal consequences, it also represents success for the prosecutors and demonstrates that the statutes provide protection for adolescent girls in Missouri.<sup>155</sup> While the factual recitation of the case provides evidence of the dynamics Oberman is presenting, certainly the outcome of the case also demonstrates something about the successes of the existing criminal justice system.

As with her discussion of *Hemme*, Oberman draws selected facts from *State v. Smith*<sup>156</sup>—the case in which three older teenage males engaged in sex acts with a thirteen-year-old girl—to make a point as to “adolescent naiveté” of teenage girls. However, Oberman use of the facts to springboard into a criticism of prosecutors and judges is incomplete. She states:

The fact that the defendant [Smith] was not charged with rape is not a fluke. . . . Prosecutors, worried about whether they might succeed in obtaining a conviction against a defendant when the victim initially consented to some sexual contact, often opt for the easier route of a statutory rape charge. And the trial court’s response to this victim—viewing her as a “loose” girl who had con-

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<sup>152</sup> *Id.* at 822 n.80 (emphasis added).

<sup>153</sup> *Hemme*, 969 S.W.2d at 868.

<sup>154</sup> *Girls in the Master’s House*, *supra* note 15, at 822.

<sup>155</sup> *Hemme*, 969 S.W.2d at 868.

<sup>156</sup> 688 So. 2d 639 (Fla. Dist. Ct. App. 1996).

sented to sexual contact with all three boys, rather than as a victim of unwanted anal penetration, and a subsequent vaginal rape—validates the prosecutors' fears.<sup>157</sup>

As with *Hemme*, however, Oberman fails to highlight several key facts. Most significant is the fact that an appellate court reversed the trial court's decision. The trial judge in *State v. Smith* departed downward from sentencing guidelines on the grounds that the victim's prior conduct was consensual. The appellate court noted, "[I]t is inconceivable that the key feature of this criminal statute, i.e. irrelevancy of the child's consent to sex, would nevertheless be a basis to disregard the statutorily prescribed penalty for its commission."<sup>158</sup> The appellate court focused on the fact that an adult and a thirteen-year-old were engaged in sexual intercourse, describing the victim's state of mind or vulnerability as irrelevant.<sup>159</sup> While Oberman notes the reversal in a footnote, she does not point out the significance of the appellate court's reversal. Given that Oberman uses the trial court's action to demonstrate the "disastrous consequences" of judicial bias,<sup>160</sup> surely it is noteworthy that the higher court viewed the trial court's interpretation of the law as applied to the sexual abuse of a thirteen-year-old as "inconceivable."

Moreover, Oberman's claim that the thirteen-year-old victim's "age-appropriate naiveté rendered this victim legally rapable" implies that she was sexually violated with no criminal consequences.<sup>161</sup> This clearly was not the case, as the defendant was convicted of two counts of

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<sup>157</sup> *Regulating Consensual Sex*, *supra* note 15, at 724–25.

<sup>158</sup> *Smith*, 668 So. 2d at 642 (emphasis added). The court has since receded from this holding in part. *See State v. Rife*, 733 So. 2d 541 (Fla. Dist. Ct. App. 1999) (en banc), *affirmed*, *State v. Rife*, 2001 WL 359697 (Fla. 2001) (unpublished opinion). In *Rife*, the victim was sixteen and seventeen at the time of the offenses, and the court distinguished *Smith* on the grounds that the thirteen-year-old victim in *Smith* was not a willing participant, whereas the justices viewed the older victim in *Rife* as a fully willing participant. 733 So. 2d at 544. *See infra* notes 267–71 and accompanying text for additional discussion of this case.

The facts of *Rife*—as restated by one of the dissenters—present another compelling factual situation demonstrating the insecurity and naiveté of a child who can be taken advantage of by an adult. *See Rife*, 733 So. 2d at 547–51 (Thompson, J., dissenting).

<sup>159</sup> *Smith*, 668 So. 2d at 644 (stating that "neither the level of intimacy nor the degree of harm are relevant when an adult and a child under the age of sixteen engage in sexual intercourse.").

<sup>160</sup> She states: "This failing [that judges cannot see force when the act looks consensual] has disastrous consequences for young girls who are the victims of unwanted sexual contact." *Regulating Consensual Sex*, *supra* note 15, at 725.

<sup>161</sup> *Id.* at 726. Perhaps Oberman considers the victim "legally rapable" because *Smith* was not convicted of an offense that carried with it the label "rape;" the offense for which he was convicted was labeled a "lewd act upon a child." *See Smith*, 668 So. 2d at 640. If her concern is one of terminology, then under these circumstances, the better label for *Smith* is "child molester"—a term often associated with one who commits a lewd act upon a child. Whether he is labeled "child molester" or "rapist," though, does not much matter. What is of consequence is that he received a substantial punishment for his sexual abuse of a child.

committing a lewd act upon a child, offenses that carried a term of incarceration ranging from nine to twenty-two years.<sup>162</sup> The younger girl was the victim of a sexual offense, and the defendant was punished with a lengthy incarceration for his criminal behavior.

Finally, Oberman discusses *Jason B.*,<sup>163</sup> the case in which the sixteen-year-old football player was adjudicated as a youthful offender for sexual acts committed against a fourteen-year-old girl.<sup>164</sup> Even though this case represents a prototypical “acquaintance rape” case with all its problems of proof, the result was a criminal conviction. Thus, the criminal laws of the state recognized the criminal violation against the younger girl, and the older, exploitive boy was punished.

In summary, Oberman’s case studies are useful in that they explore in detail, with real victims, the dynamics of sexual victimization. However, the cases she cites also serve to demonstrate that the criminal justice system does, at times, properly detect and punish exploitive sexual behavior against juveniles. To this extent, the case studies fail to support Oberman’s ultimate point that the law is desperately in need of reform.

### 3. *The Prosecutorial Dilemma*

After laying the groundwork that millions of teenagers in the United States are sexually active and that all sexual activity by teenagers under the age of sixteen is criminal,<sup>165</sup> Oberman presents the fundamental dilemma she perceives results from this situation—that prosecutors face the daunting problem of how to prioritize cases.<sup>166</sup> According to Ober-

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<sup>162</sup> The appellate court noted that the appropriate guidelines for this offense permit a sentence of nine to twenty-two years incarceration. *Smith*, 668 So. 2d at 642. *Smith* also has his picture, address, and identifying information posted on the internet as a registered sex offender. See Fla. Dept. of Law Enforcement, *Sexual Offenders/Predators Search System*, at [http://www.fdle.state.fl.us/sexual\\_predators](http://www.fdle.state.fl.us/sexual_predators) (last visited Oct. 18, 2002).

<sup>163</sup> 729 A.2d 760.

<sup>164</sup> See *Regulating Consensual Sex*, *supra* note 15, at 726–28.

<sup>165</sup> Oberman’s articles repeatedly reinforce the view that all sexual activity between teenagers should be prosecuted as criminal conduct. Indeed, the very title of the article *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape* highlights the opinion that statutory rape laws should be used to regulate consensual sex with (i.e., between) minors. For other examples, see *Turning Girls into Women*, *supra* note 15, at 73 (“[T]he attempt to identify differing degrees of sexual coercion by age or family relation seems to endorse the notion that fully consensual intercourse between teenagers is the norm, and is not legally problematic.”); *Regulating Consensual Sex*, *supra* note 15, at 751 (Statutory rape laws are enforced “at the margins, rather than in the main,” with the main being consensual sex between minors and the margins being cases involving coercion, wide age disparities, and the like.); *id.* at 733 (“What is difficult about statutory rape is selecting which rapes, of the millions that take place every year, merit prosecution.”); *id.* at 750 (“[T]here is an apparent consensus among prosecutors against enforcement of statutory rape laws in cases of ‘consensual sexual relationships’ between peers. This is explicitly acknowledged by some state criminal justice officials, and is plainly evidenced by the numerous enforcement strategies that focus exclusively on older perpetrators.”).

<sup>166</sup> See *Regulating Consensual Sex*, *supra* note 15, at 733.

man, it is not a problem of differentiating the coercive from the non-coercive or of improving reporting.<sup>167</sup> Rather, the problem, she says, is one of prioritizing the 7.5 million incidents of sexual intercourse between teenagers—each of which, according to Oberman, constitutes a criminal act.<sup>168</sup>

As was demonstrated above, however, in most states no crime is committed when two teenagers engage in voluntary sexual activity.<sup>169</sup> Therefore, Oberman's prosecutorial dilemma does not exist at a national level.<sup>170</sup>

## B. FALSE PERCEPTIONS

Oberman criticizes the way in which prosecutors prioritize cases, arguing that while strict liability offenses are not difficult to prove,<sup>171</sup>

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<sup>167</sup> The underreporting of crime and the failure to prosecute acts that are clearly criminal are entirely separate matters. It is well established that many acts of non-voluntary sex go unreported and that even among reported cases of both voluntary and non-voluntary sex involving children, prosecutors and law enforcement officers often fail to pursue cases with much vigor. See *infra* note 292. Oberman's suggestion, however, is that prosecutors are perfectly aware that vast numbers of children are engaging in illicit conduct (voluntary sex between teenagers) and that they are faced with a daunting problem in prioritizing these cases.

<sup>168</sup> On a few occasions, Oberman appears to recognize that some sexual activity between teenagers can be wanted and fully voluntary. See *Girls in the Master's House*, *supra* note 15, at 825 ("We must use the shelter of [statutory rape laws] to articulate a coherent vision of healthy sexual socialization as a critically important adolescent task in which one ideally enjoys room for experimentation, while at the same time remaining protected from coercion and exploitation."); *Regulating Consensual Sex*, *supra* note 15, at 752 ("To be sure, some of those omitted from protection may be engaged in mutually desired, pleasurable sexual relations."); *Regulating Consensual Sex*, *supra* note 15, at 777 ("The challenge in reforming statutory rape law lies in determining how to protect adolescents as they move through their teenage years, enabling them to explore and grow sexually, without leaving them completely open to the harms of coercion, exploitation and abuse."); *Regulating Consensual Sex*, *supra* note 15, at 778 (noting that strict enforcement of the law could "burden[ ] some of the 'under age' population with unnecessary 'protection' from desired sexual relationships").

Ultimately, though, she returns to the theme that all sexual activity between teenagers—even that which appears by all objective accounts to be fully voluntary—must be closely regulated by the state in order to avoid exploitation of girls who cannot meaningfully agree to participate in the sexual activity. See *Regulating Consensual Sex*, *supra* note 15, at 704 ("the fact that a behavior is typical does not necessarily dictate that it should be completely unregulated").

<sup>169</sup> See *supra* notes 113–20 and accompanying text.

<sup>170</sup> Even in those states in which voluntary sex between teenagers is a crime, prosecutors are not perplexed as to how to prioritize cases. If there is no evidence of coercion or other wrongful conduct, prosecutors simply do not have the resources (or the inclination) to prosecute these cases. See Sandy Nowack, *A Community Prosecution Approach to Statutory Rape: Wisconsin's Pilot Policy Project*, 50 DEPAUL L. REV. 865, 873–74 (2001) ("In reality, non-coerced sexual contact between two adolescents is not typically charged without some aggravating factor.").

<sup>171</sup> *Regulating Consensual Sex*, *supra* note 15, at 733. This in itself is a highly questionable assertion. Oberman states:

The problem with statutory rape law enforcement is *not that it is difficult to prove*.

Indeed statutory rape laws are fine examples of strict liability offenses. In most

prosecutors use inappropriate methods in "selecting which rapes, of the millions that take place every year, merit prosecution."<sup>172</sup> She claims that prosecutors primarily select cases in which teenage girls are pregnant or the perpetrator is "sick," while ignoring nearly all other cases of statutory rape. These empirical claims, however, do not withstand close examination.

### 1. *Of the Pregnancy Factor*

Action by Congress and several state legislatures in the 1990s left the impression that a primary societal objective in enforcing sexual crimes against adolescents is to lower the expenditure of government funds for children born to teenage girls.<sup>173</sup> Oberman accurately perceives the *legislative* priorities demonstrated by these laws. Much less

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jurisdictions, all that is needed to determine culpability is evidence that the victim's age falls within the framework protected under state law, and the sexual contact occurred. The defendant's state of mind, including the extent to which believed his partner was older than she was, generally is irrelevant. *Relatively speaking, these are easy crimes to prove.*

*Id.* (emphasis added).

Material published by the national association of prosecutors who prosecute these crimes takes an entirely different view of such cases. The opening paragraph of the child abuse prosecution manual produced by the National District Attorneys Association states:

Child abuse is uniquely difficult to prosecute. No other type of case presents such consistently complex psychological and social dynamics. No other type of case so often requires the prosecutor to go to trial with a child as the most crucial witness.

NAT'L DIST. ATTORNEYS ASSOC., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 1 (2d ed. 1993). While the NDAA manual uses the term "child abuse" rather than "statutory rape," its authors are addressing the same topic Oberman raises—sexual crimes against minors that are strict liability offenses. Unlike Oberman, however, the prosecutors believe these are difficult cases to prove. Further, the class of cases on which Oberman focuses—sexual activity involving two juveniles—represents an exceedingly difficult class of cases to prosecute. Teenagers frequently are not sympathetic witnesses; rape shield laws may very well not exclude evidence of a teenager's other sexual activities; and often the only witness is a teenager whose credibility is attacked. Moreover, as in cases of date rape, judges and juries have proven to be extremely reluctant to believe victims. Thus, even though the offense is a strict liability crime, there is no assurance of a guilty verdict. *See also* Nowack *supra* at 874–75 (discussing "the same difficult proof issues" presented by other sexual assaults).

<sup>172</sup> *Regulating Consensual Sex*, *supra* note 15, at 733.

<sup>173</sup> *See supra* notes 66–70 and accompanying text. I agree with Oberman that a focus solely (or primarily) on teenagers who get pregnant to the exclusion of other victims is a poor criterion to use in determining which cases to prosecute. *See Regulating Consensual Sex*, *supra* note 15, at 737–38. In fact, the legislative focus on teen pregnancy in the 1990s inspired me to think seriously about the construction of child sexual abuse statutes in the United States. *See Phipps*, *supra* note 14. In that article I stated:

A societal message that an adult male will be prosecuted only if he gets a girl pregnant risks overlooking the harm caused to the many children who do not get pregnant, as well as overlooking all harm to boys and pre-pubescent girls. While harm to society generally—including economic harm—is one factor to consider in making conduct criminal, the harm to the child always should be society's first concern.

*Id.* at 119.

persuasive, though, is her conclusion as to the degree to which state and federal laws have affected *prosecutors'* sense of priorities.

Oberman cites a California program as evidence of the focus on pregnancy prevention. A special unit in the governor's office, the Statutory Rape Vertical Prosecution Unit (SRVP), awards grants to assist local units of government in prosecuting statutory rape.<sup>174</sup> Moreover, the SRVP web page identifies pregnancy prevention as a purpose of the statutory rape vertical prosecution program.<sup>175</sup>

A look at the SRVP's published report, however, draws into question the extent to which legislative policies have affected prosecutors. For example, the three cases provided as "representative" of cases being prosecuted through the SRVP program all involve classic instances of child sexual abuse.<sup>176</sup> One case involves a thirty-nine-year-old man convicted of offenses committed against a fourteen-year-old neighbor and nine-year-old niece.<sup>177</sup> The second example is an adult female defendant (no age given) convicted of having sex with a fifteen-year-old male neighbor.<sup>178</sup> The third example is a thirty-two-year-old man convicted of committing sex crimes against a fourteen-year-old female neighbor.<sup>179</sup> The report does not summarize the ages of all defendants prosecuted through the program, nor does it indicate how many of the victims were pregnant or how often pregnancy was a factor in charging decisions.

Commentary by local communities also is telling. The SRVP program administrator in one county reported:

We thought we'd be getting Romeo and Juliet cases, but it's been more serious than that. The girls are really young. Most of these men are very predatory. . . . These guys are picking on these girls because they are easy to manipulate and control.<sup>180</sup>

Thus, rather than increasing prosecutions only of defendants who impregnated girls, California prosecutors appear to have found that in-

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<sup>174</sup> GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING, STATUTORY RAPE VERTICAL PROSECUTION REPORT (2000).

<sup>175</sup> The web page states: "California teen pregnancies had reached epidemic proportions resulting in major societal consequences. As a response to this serious problem the Governor's Office, through OCJP, provides grant funding to District Attorney's Offices to vertically prosecute unlawful sexual intercourse cases and provide community outreach and education." See [www.srvp.net](http://www.srvp.net) (last visited Oct. 18, 2002).

<sup>176</sup> GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING, *supra* note 174, at 8-9. Other states with comparable reports are similarly unilluminating on this issue. See WISCONSIN OFFICE OF JUSTICE ASSISTANCE, SEXUAL ASSAULTS IN WISCONSIN 1998 (1999).

<sup>177</sup> GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING, *supra* note 174, at 8.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 9.

<sup>180</sup> Hollenberg, *supra* note 11, at 275.



creased attention and increased funding enabled them to more aggressively respond to the problem of child sexual abuse in their communities.

If pregnancy were one of the top three factors used by prosecutors in screening cases, one would expect to see evidence of this in other sources. Yet Oberman produces no such evidence, nor can I find any. Social science research, for example, does not identify pregnancy as a screening criterion considered by prosecutors. The authors of one study, for example, examined more than 1,000 cases in which child advocacy center employees interviewed minors (up to age eighteen) about suspected sexual abuse. The researchers examined the case records and attempted to identify factors that affect whether a case is successfully prosecuted.<sup>181</sup> Although the researchers note several factors related to both offenders and victims that seem to affect success in prosecution, pregnancy is not mentioned.<sup>182</sup>

Comparable studies of case flow are similarly unenlightening—pregnancy simply is not mentioned as a factor.<sup>183</sup> While these studies are not directly on point in that they look at prosecution outcome rather than entry into the system, if cases were being *screened in* primarily based on the victim's pregnancy (to the exclusion of all others), one would expect pregnancy to be considered as a variable in case outcome.

While none of this data alone is determinative, taken together, the absence of a focus on pregnancy in the relevant literature leads to the conclusion that pregnancy prevention is not a primary aim of prosecutors. While a pregnancy may provide physical evidence (e.g., DNA material) that helps prosecutors prove a case, prosecutors and other professionals do not identify pregnancy as a key factor in charging decisions and case outcomes, nor do they teach pregnancy identification as a strategy for prioritizing cases.<sup>184</sup> Therefore, in spite of a legislative emphasis in some states, empirical data fails to support Oberman's assertion that prosecutors across the country became fixated on pregnant victims during the late 1990s.

## 2. *Of Easily Identified Cases*

Oberman's second perception is that prosecutors focus solely on easily identified cases to the exclusion of many other problematic

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<sup>181</sup> See Delores D. Stroud et al., *Criminal Investigation of Child Sexual Abuse: A Comparison of Cases Referred to the Prosecutor to Those Not Referred*, 24 CHILD ABUSE & NEGLECT 689 (2000).

<sup>182</sup> See *id.* at 696–97 (identifying factors such as age, sex and ethnicity of child; relationship of offender to child; and injury to child).

<sup>183</sup> See ELLEN GRAY, *UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE* 108–30 (1993); Theodore P. Cross et al., *Criminal Justice Outcomes of Prosecution of Child Sexual Abuse: A Case Flow Analysis*, 19 CHILD ABUSE & NEGLECT 1431 (1995).

<sup>184</sup> See generally Nat'l Dist. Attorneys Assoc., *supra* note 171.

cases.<sup>185</sup> She argues that by focusing on such cases, prosecutors “cheat” all other girls out of the protection that is afforded them under the statutes.<sup>186</sup> Further, she claims that prosecutors ignore other “relatively neutral” approaches to screening cases,<sup>187</sup> and choose, instead, prioritization methods that “tend to identify predominately poor, minority girls and their partners.”<sup>188</sup>

Oberman cites states legislation that requires health care providers and state agencies to notify prosecutors when they encounter teenagers who are pregnant or infected with a sexually transmitted disease.<sup>189</sup> Tennessee, for example, enacted a law in 1996 that “encourages” a person providing treatment to a pregnant girl under eighteen to make a report if the person discovers that the father is four or more years older than the child.<sup>190</sup> The law does not *mandate* reporting and it requires the consent of the patient or parent before making the report. A different law requires a state agency to make a report when a teenager between the ages of thirteen and seventeen applies for public assistance.<sup>191</sup>

As with her criticism of the pregnancy prevention rationale, Oberman is correct in pointing out the shortcomings of this approach. Certainly a primary focus on pregnant teenagers risks excluding many other cases of sexual exploitation in which a victim does not get pregnant.<sup>192</sup> However, the fact that a few *legislatures* acted fails to demonstrate that pregnancy prevention has become one of the top three methods by which *prosecutors* prioritize cases.<sup>193</sup>

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<sup>185</sup> *Regulating Consensual Sex*, *supra* note 15, at 751.

<sup>186</sup> *Id.* at 751–52 (“[T]he tendency to target cases involving overreaching or wide age ranges turns a blind eye to the coercion and abuse that may infect sexual encounters among peers. . . . By reinterpreting and narrowing the scope of crimes prosecuted under statutory rape laws, the executive branch has cheated girls out of the protection ostensibly provided them by these statutes.”).

<sup>187</sup> Oberman argues that policing teenage “parking” spots would be a mostly neutral manner in which to identify cases:

Indeed, it seems likely that a nightly sweep of the ‘parking’ locales in any given city, suburb or country town would yield ample work for the local district attorneys [sic] office. This method of selecting cases would be relatively neutral in terms of its impact upon young people of varying race, ethnicity and socio-economic status. (Of course, it might disproportionately overlook the poorest youths, who presumably have less access to cars[.] )

*Regulating Consensual Sex*, *supra* note 15, at 739.

<sup>188</sup> *See id.*

<sup>189</sup> *See id.* at 739–43.

<sup>190</sup> TENN. CODE ANN. § 38-1-302(a) (1997).

<sup>191</sup> *Id.* § 38-1-305 (1997).

<sup>192</sup> *Regulating Consensual Sex*, *supra* note 15, at 742.

<sup>193</sup> Oberman does not use these statutes merely as examples of isolated instances of misplaced legislative policies. Rather, she uses these laws as evidence of “existing mechanisms for selecting statutory rape cases for prosecution.” *Regulating Consensual Sex*, *supra* note 15, at 753; *see also id.* at 752 (“these three enforcement strategies leave an entire realm of victims wholly unprotected”), at 753 (“Contemporary statutory rape enforcement priorities re-

To begin with, this type of legislation was passed only in a handful of states, making it difficult to argue that it represents any type of national trend.<sup>194</sup> Moreover, even in those states in which legislation was enacted, Oberman provides no support for the factual assertion that reporting by health care providers and state agencies changed or increased in those states. At most, these laws may have increased reporting for acts that did not fall within existing child abuse reporting statutes.<sup>195</sup> While limited anecdotal evidence shows a few prosecutors have considered pregnancy a key reason to prosecute cases,<sup>196</sup> there is no evidence that this trend has taken hold in most prosecutors' offices around the country.

Oberman also asserts that prosecutors screen cases by choosing only the worst, or "sick," cases to prosecute. She states:

Perhaps the most common means of narrowing the potential docket of statutory rape prosecutions involves focusing on the most obviously exploitative scenarios in which statutory rape violations occur. These include incestuous or quasi-incestuous encounters, relationships between young people and those in a position of trust or authority, and sexual activity between young people and significantly older partners.<sup>197</sup>

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veal. . ."). Thus, she is claiming that these "enforcement strategies" are priorities across the country and reveal systematic flaws in how cases are selected for prosecution.

<sup>194</sup> See, e.g., MISS. CODE ANN. § 43-17-35 (2000) (creating an out-of-wedlock pregnancy task force); TENN. CODE ANN. § 38-1-305 (1997) (requiring reporting to law enforcement when a pregnant teenager aged thirteen to seventeen applies for public assistance). See also Abigail English & Catherine Teare, *Statutory Rape Enforcement and Child Abuse Reporting*, 50 DEPAUL L. REV. 827, 839 (2001) (citing statutory changes in Nevada, Texas, Maryland and Virginia).

<sup>195</sup> It is well documented that cases enter the child protection system primarily through teachers, doctors, and other mandated reporters. See, e.g., Gail L. Zellman & Kathleen Coulborn Faller, *Reporting of Child Maltreatment*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 359, 362 (John Briere et al. eds., 1996). For discussion of mandatory reporting statutes, see Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131 (1998).

Social science reports also highlight the fact that mandatory reporters often do not make reports even when the law requires them to do so. See Steven Delaronde et al., *Opinions Among Mandated Reporters Toward Child Maltreatment Reporting Policies*, 24 CHILD ABUSE & NEGLECT 901 (2000) (indicating fifty-eight percent of social workers, physicians, and physician assistants indicate they do not report all cases). In particular, many doctors and social service agencies habitually fail to report their interactions with young girls who are pregnant under circumstances in which the pregnancy itself would give the professional reason to believe the child had been abused or neglected. To this extent, then, empirical justification exists for policymakers to revisit the effectiveness of mandatory reporting statutes.

<sup>196</sup> See Oliveri, *supra* note 11, at 474-77 (citing newspaper stories and statutes to demonstrate enforcement efforts).

<sup>197</sup> *Regulating Consensual Sex*, *supra* note 15, at 743-44.

On this point she is entirely correct. Law enforcement officers are likely to place a high priority on allegations of a father molesting his teenage daughter, an older step-sibling molesting a teenage step-sister, or a teacher molesting a student. In contrast, a case involving two teenagers engaged in voluntary sex will receive little, if any, attention from criminal investigators or prosecutors.<sup>198</sup>

Rather than viewing the prioritization of cases by severity as an objective and reasonable approach, though, Oberman identifies this as a problem. She reasons:

[T]his enforcement pattern [i.e., the “that’s sick test”] is not wholly unproblematic for those who ostensibly fall under the law’s protective arm. As is the case with the focus on pregnancy, the tendency to target cases involving overreaching or wide age ranges turns a blind eye to the coercion and abuse that may infect sexual encounters among peers.

To support this assertion, Oberman points to her case studies to illustrate that none of them involved age disparities of ten years (apparently concluding that prosecutors overlooked those cases because they did not involve wide age disparities).<sup>199</sup> She also claims that age-span provisions would allow a seventeen-year-old to have sex with a twelve-year-old.<sup>200</sup>

Four responses are in order. First is the factual assertion that prosecutors focus on the most serious cases while ignoring “coercion and abuse” in other situations. Although this is possible in theory, Oberman provides no empirical evidence to demonstrate either that prosecutors routinely ignore cases involving coercion between peers or that they would not consider these to fall within the umbrella of “sick” cases.

Second, in stating that a focus on objective factors “assumes that problematic sexual encounters can be identified by objective factors such as age difference,” Oberman presumes that the existence of a statute spelling out objective factors necessarily makes legal all conduct falling outside of those factors. This simply is not the case. The fact that objective criteria may apply in some circumstances in no way means that an

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<sup>198</sup> In the context of evaluating pleas, the prosecutors’ manual states:

A primary consideration in plea negotiations should be the severity of the abuse. Obviously, the greater the violence or duration of criminal acts, the greater the number of victims involved, and the greater the impact of crimes on the victims, the more reasons there are to pursue a case vigorously.

NAT’L DIST. ATTORNEYS ASSOC., *supra* note 171, at 224.

<sup>199</sup> *Regulating Consensual Sex*, *supra* note 15, at 751 (“consider the fact that none of the cases discussed in Part I of this article involve age disparities of ten years”).

<sup>200</sup> *Id.* at 768–69.

offense is unprosecutable if the factor is not present. Assume, for example, that a statute declares that a person aged seventeen or older who engages in sexual activity with another under the age of fourteen commits the offense of statutory rape. A defendant who is sixteen and who uses force or coercion would still be criminally liable, though under a separate statutory provision.<sup>201</sup> The fact that a legislature has enacted a strict liability provision with objective criteria such as age span provisions does not mean that the legislature intends other statutory provisions to be ignored.

Third, Oberman's case studies do more to demonstrate the legitimacy of age span provisions than to undermine them. As noted above, nearly all of the cases she cites resulted in criminal convictions either under strict liability or nonconsensual rape statutes.<sup>202</sup> Thus, rather than demonstrating how age-span provisions caused these cases to be ignored, the case studies demonstrate how wrongful conduct can be identified both by statutes involving age spans and statutes in which coercion must be proven. Therefore, Oberman's own evidence demonstrates how statutes that objectively identify unacceptable behavior in no way exclude the possibility of prosecuting cases of "problematic sexual encounters."<sup>203</sup>

Finally, Oberman is incorrect as a matter of law in asserting that twelve-year-olds who have sex with seventeen-year-olds will be unprotected. Nearly every state divides sex offenses against minors into at least two tiers, creating a more serious offense involving younger victims (typically under fourteen) and a less serious offense involving older victims (typically those aged fourteen and fifteen).<sup>204</sup> With the first tier offenses—those involving the youngest grouping of children—none of the exceptions and qualifications discussed in this article exist. That is, when a victim is twelve, the age of the perpetrator is irrelevant, making sexual activity between a seventeen-year-old and a twelve-year-old a serious felony anywhere in the United States.<sup>205</sup> Although such provisions

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<sup>201</sup> See, e.g., *Hemme*, 969 S.W.2d at 866, in which the court applied Mo. REV. STAT. § 566.070 (1994) (deviate sexual assault); Mo. REV. STAT. § 566.032 (1994) (first degree statutory rape); and Mo. REV. STAT. § 566.062 (1994) (first degree statutory sodomy); see also statutes listed in appendix D.

<sup>202</sup> See *supra* notes 141–64 and accompanying text. The problem in most of the remaining cases was the lack of enforcement even though the conduct was criminal under existing statutes.

<sup>203</sup> *Regulating Consensual Sex*, *supra* note 15, at 752.

<sup>204</sup> See Phipps, *supra* note 14, at 55–59.

<sup>205</sup> Some states retain age span provisions for children in this group, none of which would encompass the seventeen-year-old. See Phipps, *supra* note 14, at 63 n.251.

Issues of same-age sexual activity also arise in the context of young children, but few would argue that two ten-year-olds having sex constitutes normal adolescent development. At this age, it is usually indicative of other personal or family problems and intervention is war-

are not perfect and some statutes may fail to identify problematic conduct, few modern statutes are so imprecise as to lead to the result she imagines.

Oberman does not stop here, however. She makes a broader criticism of use of the “that’s sick” test that has much more significant implications:

In more practical terms, the focus on extreme age differences or overreaching assumes that problematic sexual encounters can be identified by objective factors such as age difference. This reflects an underlying assumption that, so long as it was not forced, sex among peers causes no real injury to victim [sic]. This latter assumption saddles statutory rape law with all of the problems of prosecuting acquaintance rape.<sup>206</sup>

She goes even further in *Turning Girls into Women*:

The new generation of statutory rape laws, with complex age-span provisions designed to identify potentially coercive interactions, does little to remedy the problems inherent in the common law. . . . [T]he attempt to identify differing degrees of sexual coercion by age or family relation seems to endorse the notion that fully consensual intercourse between teenagers is the norm, and is not legally problematic.<sup>207</sup>

Thus, Oberman concludes that a focus on the “sick” cases not only causes prosecutors to ignore cases between teenagers that involve “coercive” conduct, it also causes them to ignore cases of “fully consensual intercourse between teenagers.”<sup>208</sup>

The conclusion implicit in this criticism is that prosecutors should place “sick” cases on par with cases involving fully voluntary sex. Indeed, by arguing strongly that use of objective factors to prioritize cases is of little use and, in fact, obstructs prosecution of other harmful cases,

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ranted—both for the protection of the children and their rehabilitation. See *infra* notes 312–14 and accompanying text.

<sup>206</sup> *Regulating Consensual Sex*, *supra* note 15, at 751–52. Oberman asserts that such prioritizing amounts to a “reinterpreting and narrowing” of laws intended to protect all children. *Id.* at 751.

<sup>207</sup> *Turning Girls into Women*, *supra* note 15, at 73.

<sup>208</sup> *Id.* She goes on to claim: “Girls need the law to secure their sexual autonomy. And statutory rape laws, both as traditionally conceived and as presently construed, miserably fail this task.” *Id.*

Oberman appears to be arguing for abandoning the use of objective criteria in prioritizing cases.<sup>209</sup>

Two examples demonstrate how prioritizing cases based on severity is essential in a society that devotes limited resources to the prosecution of criminal cases.

*Example One.* Tina (age fifteen) and Ted (age fifteen) are sophomores in high school who are attracted to each other. Ted asks Tina out to a movie one Friday night and afterward Ted suggests they return to his house because his parents are not home. At the house Tina and Ted engage in sexual intercourse that they both describe as fully voluntary.

*Example Two.* Sue is a fifteen-year-old whose mother has a new boyfriend who, along with his son, has moved in with them. The boyfriend's sixteen-year-old son, Sam, has pursued Sue relentlessly since moving in by constantly making sexual suggestions. Virtually every night he tells her she can have sex with him whenever she wants and that his door is always unlocked. She does not like Sam, but one night she wakes up in the middle of the night with him in bed with her. She does not physically resist, but she begs him to leave her alone. Sam does not leave but instead he engages in sexual intercourse with Sue.

Even in a state in which both Ted and Sam could be prosecuted,<sup>210</sup> no prosecutor would pursue Example One over Example Two.<sup>211</sup> Cases are "sick" because they violate fundamental notions of what is right. At times these notions are expressly spelled out by statute—society deems it a greater harm for a teacher to molest a student or a parent to molest a child.<sup>212</sup> Likewise, in the examples presented above, a boy who pressures and forces a girl with whom he is in a quasi-familial relationship is more culpable and causes more harm than the boy who engages in voluntary intercourse with his girlfriend. Far from being "problematic," an

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<sup>209</sup> She reinforces this view by making no mention of how the "sick" cases should be prioritized in relation to other cases after she spends several pages explaining various problems with the test. See *Regulating Consensual Sex*, *supra* note 15, at 751–52, 767–71.

<sup>210</sup> As has been demonstrated repeatedly, Example One could be prosecuted only in a few states.

<sup>211</sup> See NAT'L DIST. ATTORNEYS ASSOC., *supra* note 171, at 197–203 (discussing charging considerations). See also Phipps, *supra* note 14, at 96–97 (discussing factors affecting long-term adverse outcomes in child sexual abuse victims).

<sup>212</sup> See NAT'L DIST. ATTORNEYS ASSOC., *supra* note 171, at 223–26 (discussing the need to consider severity in the context of plea negotiations).

approach that recognizes differences in severity is absolutely essential in the administration of justice in society.

### 3. Summary

In contrast to Oberman's view that three prioritization strategies reign, the only empirically defensible assertion (apart from the fact that prosecutors consider severity in prioritizing cases) is that there is no uniform national approach to prosecuting cases involving an adolescent who willingly engages in sexual activity with another adolescent. The most obvious reason for a lack of national standardization is that such activity is not an offense in most states. Even in those states in which it is an offense, it is not a problem because virtually no prosecutors pursue cases of fully voluntary sexual acts between juveniles.

If the conduct at issue is limited to coercive sexual activity between juveniles, there is likewise no evidence that any particular strategy for prioritizing cases prevails. If any trend can be identified, it would be the trend to approach cases of child sexual abuse from a multi-disciplinary team perspective.<sup>213</sup> That is, rather than focusing on criteria such as whether a girl is pregnant, a team comprised of a law enforcement officer, social services investigator, and prosecutor weighs all the evidence and the law in determining whether to prosecute an individual.<sup>214</sup> There is no empirical evidence that the use of team assessment is uniform, but if one is looking at national trends, the team approach is more widespread than the prioritization criteria identified by Oberman.<sup>215</sup>

### C. MISPLACED REFORM

In light of Oberman's view that an entire class of victims is "wholly unprotected,"<sup>216</sup> and her call to reformulate<sup>217</sup> and reconfigure<sup>218</sup> the

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<sup>213</sup> See Jerome R. Kolbo & Edith Strong, *Multidisciplinary Team Approaches to the Investigation and Resolution of Child Abuse and Neglect: A National Survey*, 2 CHILD MALTREATMENT 61 (1997). In response to Kolko and Strong's survey, sixty-six percent of states reported that they had "statewide participation" in a multidisciplinary response to child abuse and neglect. *Id.* at 64. The researchers also found that states vary greatly in the composition and function of teams. *Id.* at 67-70.

<sup>214</sup> The National District Attorneys Association child abuse prosecution manual emphasized the team approach in its 1993 manual. NAT'L DIST. ATTORNEYS ASSOC., *supra* note 171, at 511-33. See also DONNA PENCE & CHARLES WILSON, TEAM INVESTIGATION OF CHILD SEXUAL ABUSE 121-35 (1994) (discussing factors a multi-disciplinary team should examine in assessing a case).

<sup>215</sup> Oberman identifies an "innovative" Wisconsin project that has a significant team component. See *Regulating Consensual Sex*, *supra* note 15, at 774-75.

<sup>216</sup> *Id.* at 752; see also *id.* at 706-07 (arguing that she will "attempt to repair the fault lines in the construction and implementation of contemporary statutory rape laws").

<sup>217</sup> *Id.* at 707.

<sup>218</sup> *Girls in the Master's House*, *supra* note 15, at 825 (stating that "[t]hese laws must be reconfigured from their cores").



criminal law, one would expect a radical revolution in the substantive law itself. Yet her solutions are almost entirely procedural, with virtually no concrete reforms to the substantive law.<sup>219</sup> Thus, Oberman's recommendations fall far short of the wholesale revision of statutory rape law she sets out to create.

This reconfiguration fails on three levels. First, Oberman's proposal to rely on strict liability offenses would require reversal of current law in most states and would amount to a significant step backward rather than forward.<sup>220</sup> Second, her proposal to modify sentencing structures avoids the fundamental problem and does not remedy it. Third, her recommendations concerning victim involvement are likely to harm rather than help victims.

### 1. *Reversing the Law*

In calling for advocates to "reclaim" and "enlist" statutory rape laws, Oberman urges states to use strict liability statutory rape laws to prosecute sexual activity between teenagers.<sup>221</sup> Although she apparently believes there are times when these laws should be used to prosecute cases of voluntary sex,<sup>222</sup> her call primarily appears to be for the use of a strict liability offense to prosecute cases falling in the "gray" area that would not be covered by child sexual abuse or rape statutes.<sup>223</sup> Thus, the essence of her recommendation is that prosecutors use strict liability child sexual abuse offenses to regulate sexual behavior between adolescents of comparable age. In this way, according to her argument, cases involving subtle coercion or manipulation can be pursued when prosecution under a traditional rape statute would be difficult or impossible.

However, because the criminal statutes in most states do not apply to voluntary sexual activity between teenagers, the unstated but unavoidable first step that must be taken to implement Oberman's recommendation is to amend the law in thirty-eight states to allow for prosecution of teenagers who engage in voluntary sex with each other. Seen in this light, Oberman's reconfiguration becomes a call for a revocation of the law in three-fourths of the states. This reversal of existing law is misguided for several reasons.

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<sup>219</sup> Implicit in her approach is a need for the substantive law to be changed in a majority of states. However, this is not a recommendation she expressly makes, since she presumes the law already is as she would have it be.

<sup>220</sup> See *supra* notes 113–17 for discussion of the modern trend to create age differentials and not criminalize voluntary sexual activity between teenagers.

<sup>221</sup> See *Girls in the Master's House*, *supra* note 15, at 825.

<sup>222</sup> See *supra* notes 165–72 and accompanying text.

<sup>223</sup> *Regulating Consensual Sex*, *supra* note 15, at 750; *Turning Girls into Women*, *supra* note 15, at 73.

a. Oberman's Reconfiguration Gives Overbroad Discretion to Prosecutors

A significant problem with using strict liability offenses in the manner Oberman advocates is that it gives prosecutors carte blanche to define the law as applied to teenagers. When considering how to charge a criminal act, prosecutors routinely assess the law, the evidence, and the likelihood of conviction. Based on the available evidence, the prosecutor may determine to proceed to trial or accept a plea on a lesser offense when a greater offense could conceivably be proven. This is an everyday, routine exercise of prosecutorial discretion.<sup>224</sup> A vital limit on this discretion, though, is that the underlying conduct is made criminal by statute and the prosecutor exercises discretion only in terms of which criminal offense to apply to the conduct.

The discretion Oberman advocates, however, is of a categorically different type. Under her proposal, an individual prosecutor has complete discretion to determine when a "gray area" case has crossed an undefined line into criminal behavior. Within a single state, one county prosecutor may believe that all voluntary sex between teenagers is wrong and vigorously prosecute all cases brought to her attention. A prosecutor in an adjoining county, however, might create a per se rule that any time a victim says "no," such cases are always prosecuted. And yet another county prosecutor may decide to prosecute only cases in which the female makes a prompt outcry and immediately tells a third party that sex was coerced.

Thus, rather than deciding which offense to apply to given conduct, the prosecutor would be deciding whether a crime even exists. Under the general umbrella of statutory rape law, prosecutors would be defining crimes on a case-by-case basis rather than on the basis of objective criteria established by a state legislature.

An obvious implication of such overly broad discretion is that it would unnecessarily open the door to improper considerations in the charging decision. The Supreme Court of Vermont identified precisely this concern when interpreting its statutory rape law.<sup>225</sup> In *In re G.T.*,<sup>226</sup> the court stated that the prosecutor was "candid" in explaining that he charged the juvenile under the strict liability offense rather than the stat-

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<sup>224</sup> For a discussion of prosecutorial discretion, see Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996). Another proponent of such broad discretion recognizes the inherent dangers, and cautions that objective criteria must be established within a prosecutor's office. See Nowack, *supra* note 170, at 874 (identifying the need for charging criteria "that can be applied evenly and fairly"). If, however, a prosecutor can create objective criteria for prosecuting, a legislature should be able to create these criteria in the charging statute so that the law is defined equally throughout a state.

<sup>225</sup> See *In re G.T.*, 758 A.2d 301 (Vt. 2001).

<sup>226</sup> *Id.*

ute requiring proof of lack of consent, explaining that he did so because "it creates a strict liability offense which is easy to prove."<sup>227</sup> The court criticized this approach:

[T]he prosecutor determines what crime the juvenile has committed, but charges in such a way as to ensure that the juvenile never has the opportunity to show that he or she did not commit the crime found by the prosecutor . . . [T]he selective enforcement of the underlying statute has the hallmarks that other courts have relied upon to find discriminatory prosecution.<sup>228</sup>

It is not difficult to foresee how perceptions of racially disparate enforcement and political influence would be exacerbated if prosecutors were to be given such wide latitude that they, in effect, were defining the criminal law.<sup>229</sup> Indeed, the Vermont court noted as much when it stated: "It is one thing to give discretion in enforcing a legislatively defined crime; it is quite another to give to prosecutors the power to define the crime."<sup>230</sup>

#### b. Oberman's Reconfiguration Does Not Help Prioritize Cases

Oberman's recommendation that states return to broad use of strict liability offenses does not help prioritize cases for prosecution. In *Regulating Consensual Sex*, Oberman rests upon the factual premise that there are 7.5 million cases of statutory rape annually, a "staggering" and "daunting" number, and that prosecutors use inappropriate guidelines in deciding which of those cases to prosecute. However, her reform proposal does not resolve the fundamental problem of how prosecutors should prioritize cases. While she criticizes what she perceives to be prosecutors' current guidelines, she provides no guidelines of her own.

The only part of her proposal that possibly could help prioritize cases is the suggestion that victims participate in sentencing decisions. Unfortunately, though, this recommendation is not entirely clear. At times it appears that Oberman is recommending that prosecutors charge all 7.5 million cases and then involve victims at the sentencing stage. Thus, in her initial description of her proposal, she states: "Under my scheme, the general rule would be that, for a first offense, the victim would be permitted to determine whether the perpetrator should receive

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<sup>227</sup> *Id.* at 306.

<sup>228</sup> *Id.*

<sup>229</sup> For an argument that prosecutorial discretion is exercised in a manner that disproportionately impacts minorities, see Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705 (1999).

<sup>230</sup> *In re G.T.*, 758 A.2d at 306.

an opportunity for a suspended sentence.”<sup>231</sup> Although she does not specify how this scheme would work, presumably prosecutors would charge out all cases and the victims would then decide when to allow a suspended sentence.

At other times, Oberman appears to be suggesting that prosecutors charge only those cases in which a victim asks the prosecutor to press charges.<sup>232</sup> For example, she indicates she would “requir[e] the victim’s cooperation *in order to proceed*,”<sup>233</sup> and that under her proposal, “the young person *would be permitted to decide for herself* whether the relationship in which she was engaged was consensual.”<sup>234</sup> If indeed she is proposing that cases not be charged without victim approval, it is entirely likely that the number of prosecutions would go *down* rather than up. Since prosecutors often must proceed in spite of a victim’s objection, it is likely that many cases would not go forward if victim cooperation is required.<sup>235</sup>

Regardless of how she intends her proposal to work, Oberman’s suggestion to involve victims does not aid prosecutors in prioritizing cases. Oberman provides no criteria for prosecutors to use in assessing whether the victim’s recommendation is voluntary rather than the result of parental pressure; she provides no clear statements of circumstances under which a victim’s participation would not be required; and she provides no indication of what factual circumstances might give one case priority over another. Without these criteria, it is difficult to see how her recommendation helps prosecutors prioritize cases.

It is likewise hard to imagine that implementing Oberman’s proposal would cause previously unknown victims to come forward. That is, even if the substantive law were changed nationwide to allow wide prosecutorial discretion and prosecutors adopted her recommendation to reclaim these laws on behalf of teenage girls, it is highly unlikely that this alone would cause scores of previously unknown victims to go to prosecutors’ offices and press charges. Without some additional massive and systematic reforms—such as an infusion of money for training mandatory reporters, investigators, and prosecutors—it is improbable this proposal would result in any practical change in the way cases make it to a prosecutor’s desk.

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<sup>231</sup> See *Regulating Consensual Sex*, *supra* note 15, at 778.

<sup>232</sup> See *Regulating Consensual Sex*, *supra* note 15, at 781 (stating that her approach allows the adolescent “to decide for herself whether the relationship in which she was engaged was consensual”).

<sup>233</sup> *Id.* at 781 (emphasis added).

<sup>234</sup> *Id.* (emphasis added).

<sup>235</sup> See NAT’L DIST. ATTORNEYS ASSOC., *supra* note 171, at 343.

## c. Oberman's Reconfiguration Makes the Law Vague

Oberman avoids focusing on definitional matters or objective criteria in sex crimes statutes, arguing that a focus on "objective factors" will "saddle[ ] statutory rape law with all of the problems of prosecuting acquaintance rape." Since the problems with prosecuting acquaintance rapes are problems of objective proof (how consent is defined and then how it is proven in court), she believes the best way to avoid the problems of definitions and problems of proof is to use a strict liability crime.<sup>236</sup>

Her proposal apparently would work as follows. First, a statute would define a strict liability criminal offense: "A male who has sexual intercourse with a female under the age of consent commits an offense." Second, a statute would establish that a teenage girl would decide whether the defendant receives a suspended sentence.<sup>237</sup> If the girl does not make a decision, the prosecutor would determine whether to offer a suspended sentence.<sup>238</sup> Thus, if the girl speaks, her decision is determinative; if she does not speak, the prosecutor decides. Although this proposal would accomplish the goal of empowering some girls, its subjectivity also would result in an extraordinarily vague criminal offense.

Consider Examples One and Two again. Assume that the day after engaging in sexual intercourse with Ted, Tina tells several friends that she voluntarily engaged in sexual intercourse with Ted. Tina and Ted publicly profess their love, and Tina repeatedly tells friends she thinks they will get married after they graduate. They continue a sexual relationship for several months, but eventually they break up. At this point, Tina feels shame for her sexual activity with Ted, and she pursues criminal charges against him. He is prosecuted, and Tina does not recommend a suspended sentence. Under Oberman's proposal, Ted's acts become a serious crime based on Tina's change of heart.

Likewise, the victim in Example Two is not assured of protection. If Sue's mother does not want the relationship with her boyfriend disrupted, she is likely to place inordinate pressure on Sue to drop any criminal proceedings. Thus, so long as Sue tells the prosecutor that she desires a suspended sentence for Sam, he is likely to receive little or no punishment for his conduct. By not defining the wrongful conduct and instead leaving it up to the victim, Oberman's proposed statutory scheme

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<sup>236</sup> *Regulating Consensual Sex*, *supra* note 15, at 752.

<sup>237</sup> *See id.* at 777-79 (discussion under the heading of "Statutory Reform"). Or perhaps the statute would allow the victim to make the decision at the charging stage. *See supra* notes 232-35 and accompanying text.

<sup>238</sup> *See Regulating Consensual Sex*, *supra* note 15, at 778-79.

fails to protect Sue and does not teach Sam that his conduct is unacceptable.

d. Oberman's Reconfiguration Does Not Ensure Convictions

In arguing for an expanded use of the strict liability offense in the context of acquaintance rape, Oberman argues that prosecutors may be reluctant to prosecute cases of forcible rape because of a "society's tendency to blame the victim."<sup>239</sup> The solution, she states, is to charge the rapist with statutory rape and "thus be assured of a conviction."<sup>240</sup> She argues that statutory rape laws "provide a de facto stop gap" and allow conviction of one who otherwise might escape conviction "because of deep-seated societal norms that undermine convictions."<sup>241</sup>

However, changing the label of the offense—and even changing the elements of the offense—will not change the underlying societal views that affect prosecutorial discretion and jury deliberations.<sup>242</sup> Thus, a societal tendency to blame the victim will affect a prosecution for statutory rape just as it would affect a prosecution for forcible rape. A prosecutor who believes a victim seduced a defendant or engaged in sexual activity voluntarily will exercise her discretion not to prosecute, even if the offense is "statutory rape" rather than "forcible rape." Likewise, if a juror believes that most accusations of rape are false, prosecutors will have a difficult time convincing that juror even if the charge is "statutory rape."<sup>243</sup>

In sum, the substantive criminal law must be more precise than Oberman's proposal allows. If the conduct is truly of the type that deserves strict liability status, then it should be enforced consistently whenever the elements of the statutory offense are met. Alternatively, if something other than the act of sexual intercourse is the objectionable conduct (e.g., use of coercion), then that conduct must be defined. Because the offense as construed by Oberman is neither a consistently-enforced strict liability offense nor a well-defined nonconsensual offense, the crime becomes pliable and ever-changing. To create such a subjec-

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<sup>239</sup> See *Girls in the Master's House*, *supra* note 15, at 820.

<sup>240</sup> See *id.*

<sup>241</sup> See *id.* at 821.

<sup>242</sup> See 1 PAUL DEROHANNESIAN, *SEXUAL ASSAULT TRIALS* 147 (2d ed. 1998) ("Most jurors will make decision based upon feelings, emotions, and previously held beliefs, and not just upon the facts through a rational process.").

<sup>243</sup> See David P. Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L. REV.* 317, 429–30 (2000) (arguing that, in the context acquaintance rape cases, changing the offense from "rape" to "assault" is not likely to affect a jury's assessment).

tive, undefined offense is objectionable both as a matter of public policy and as a matter of constitutional law.<sup>244</sup>

## 2. *Diluting the Punishment*

After demonstrating the problems with statutory rape laws, highlighting the need for reform, and presenting her view of the rationale to support a reformed system, Oberman presents the "law reforms necessary to effectuate that rationale."<sup>245</sup> She promises a "practical solution"<sup>246</sup> and a "comprehensive approach"<sup>247</sup> that will "repair the fault lines in the construction and implementation of contemporary statutory rape laws."<sup>248</sup> The first step in this process, she argues, is to modify sentencing schemes. As she states it: "I begin my reform by urging criminal justice officials to employ the broad range of options available under the law in crafting punishments for those guilty of statutory rape."<sup>249</sup>

While prosecutors pursuing the cases with which she is concerned certainly should look at rehabilitation rather than incarceration, this reform proposal falls far short of Oberman's stated goal of comprehensive reform. The two main issues raised by Oberman's criticism call for clarified definition of the underlying offense and a revision of how prosecutors prioritize cases. Altering sentencing schemes addresses neither of these problems.

Oberman continues by making one of the most curious comments in her article. She states:

In an environment saturated with messages encouraging the sexual objectification of young women, it is easy to understand why boys and men might pursue their own sexual gratification at the expense of their partner. Because sex for adolescents is somewhat experimental in nature, it is important to acknowledge that mistakes will occur.<sup>250</sup>

After attempting to qualify what she means by "mistakes," Oberman concludes: "Thus, to the extent that the law ignores the learning curve at work in adolescent sexual encounters, it may be too harsh."<sup>251</sup>

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<sup>244</sup> See *In re G.T.*, 758 A.2d at 306 (noting potential equal protection concerns with selective prosecution). See generally 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 2.3, at 126-35 (1986).

<sup>245</sup> *Regulating Consensual Sex*, *supra* note 15, at 754.

<sup>246</sup> *Id.* at 753.

<sup>247</sup> See *id.* at 775 (stating that none of the other reform proposals "offers a comprehensive approach" and they all "fall somewhat short").

<sup>248</sup> *Id.* at 707.

<sup>249</sup> *Id.* at 776.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 777.

That is, a teenage boy who incorrectly believes a teenage girl is consenting to sex should still be held liable, but should be treated leniently if it is evident that his conduct is the result of a "mistake" or part of the "learning curve." While not going so far as to say that a mistake of fact should remove criminal liability,<sup>252</sup> she argues that a mistake of fact as to a girl's consent should mitigate his sentence.

This argument presents substantial inconsistencies. The essence of a strict liability offense is that a defendant's state of mind is irrelevant. That is, the wrongful conduct is the defendant's act of sexual intercourse with an underage minor—the fact that a victim appears to consent is not relevant. It follows, then, that punishment should respond to the underlying wrongful conduct—the sex act that is *per se* illegal—without consideration of whether the defendant was "mistaken" as to the victim's consent.<sup>253</sup> The argument that the defendant's state of mind becomes relevant at sentencing is at odds with the purpose of the strict liability offense, which is to punish the wrongful *conduct*—sexual intercourse with an underage minor.

Alternatively, if Oberman is arguing that the underlying wrongful conduct targeted by the offense is the use of coercion, then describing the conduct as a "mistake" or part of a "learning curve" is troublesome. If coercion is the issue, then it needs to be recognized as exploitive and wrongful, and indeed, it ought to be labeled as rape. Thus, although Oberman argues that "clear lines" and "certain consequences" need to be established,<sup>254</sup> her conflicting discussion concerning mental states makes these lines and consequences far from certain.

### 3. *Dis-empowering Victims*

After establishing her preliminary recommendation concerning sentencing, Oberman reaches the crux of her reform proposal—allowing female victims to make sentencing (and perhaps charging) determinations. Again, it must be emphasized that this recommendation is not simply that teenagers be heard, as in victims' rights legislation. Rather, Oberman states the victim should "be permitted to *determine* whether the perpetra-

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<sup>252</sup> See 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 5.1, at 575 (1986) ("[T]he basic rule is extremely simple: ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged").

<sup>253</sup> Feinberg makes a similar criticism of a Washington sentencing scheme. He states: "This must be one of the rare places in the law where voluntariness that is insufficient to make consent valid nevertheless has other legal effects, in this case mitigating ones." FEINBERG, *supra* note 2, at 330.

<sup>254</sup> On the entire issue, Oberman is not at all clear. After stating that "mistakes will occur," *Regulating Consensual Sex*, *supra* note 15, at 776, she almost immediately turns around to say that "the failure to condemn 'mistakes' involving nonvoluntary sex with an underage partner is . . . pernicious. Lenience in such cases only encourages girls to internalize a sexual script . . ." *Id.* at 777.



tor should receive an opportunity for a suspended sentence,”<sup>255</sup> and “to decide for herself whether the relationship in which she was engaged was consensual.”<sup>256</sup> Thus, this proposal places a great deal of responsibility on the girl not just to advise, but to determine whether a prosecution will go forward.

Oberman qualifies this recommendation for a subset of cases that she calls “per se violations.”<sup>257</sup> In these cases—incest, abuse of authority, and very young victims—the victim’s cooperation would not be necessary.<sup>258</sup> She goes on to identify numerous reasons why victims may not cooperate with prosecutors, and this discussion apparently is not limited to the “per se violations,” but to all cases.<sup>259</sup> Further, Oberman discusses “no drop” policies used in cases of domestic violence, stating that “victims of statutory rape need at least as much support as do the victims of domestic violence.”<sup>260</sup> To this extent, Oberman appears to be arguing that prosecutors should proceed regardless of the victim’s willingness to prosecute.

Thus, it becomes unclear whether Oberman is arguing that girls should “determine,”<sup>261</sup> or should “play[ ] a role in determining” the prosecution.<sup>262</sup> It seems that the former role would be determinative and the latter would be advisory. If she is recommending only that girls be heard, this proposal represents no meaningful advance over existing victims rights legislation present in most states.<sup>263</sup> Because her proposal would lose all force were this to be her argument, I interpret Oberman as proposing that a victim’s view as to whether to impose a suspended sentence should be determinative (or, alternatively, that the victim’s decision on whether to prosecute should be decisive).

Assuming that Oberman intends for the victim to have a determinative voice in the decision to impose a suspended sentence or to prosecute, this recommendation is highly problematic. At a basic level, it is inconsistent with Oberman’s view of girls as fundamentally incapable of making meaningful decisions on important matters—if a girl is not capable of consenting to sex, how can she have the capacity to direct a criminal

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<sup>255</sup> *Regulating Consensual Sex*, *supra* note 15, at 778 (emphasis added).

<sup>256</sup> *Id.* at 781 (emphasis added).

<sup>257</sup> *See id.* at 779.

<sup>258</sup> *Id.*

<sup>259</sup> *See id.* at 779–81.

<sup>260</sup> *Id.* at 780.

<sup>261</sup> *See id.* at 778.

<sup>262</sup> *See id.* at 781.

<sup>263</sup> *See, e.g.,* Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President’s Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 32 n.49 (1999) (listing states); Mary Margaret Giannini, Note, *The Swinging Pendulum of Victims’ Rights: The Enforceability of Indiana’s Victims’ Rights Laws*, 34 IND. L. REV. 1157 n.2 (2001) (listing states).

prosecution?<sup>264</sup> Worse yet, this recommendation shifts from prosecutor to victim the burden of making one of the most critical societal decisions—when and how to prosecute a crime. In contrast to victims' rights legislation that appropriately requires judges and prosecutors to take a victim's view into account, Oberman's recommendation places the responsibility for the outcome entirely on a victim's shoulders.

The following examples demonstrate the problems with this approach:

*Example Three.* Fifteen-year-old Joe boasts that he has had sex with ten different girls in his high school. Sally, a fifteen-year-old in Joe's high school class, is infatuated with Joe. One evening she goes to his house to watch a movie. While there, he fondles her and starts to take her clothes off. She tells him "I really don't want to do this," but she does not want to be rejected so she does not stop him from proceeding to sexual intercourse. Sally craves Joe's attention, and she does not want to prosecute him. Joe does not have any affection for Sally, but he plans to engage in further sexual activity with her whenever he can. Sally's parents know that she had sex with Joe, but they don't care.<sup>265</sup>

*Example Four.* Fifteen-year-old Jane and fifteen-year-old Bill begin dating and fall in love. Bill treats Jane with great respect and for the first six months of their relationship they do not engage in sexual intercourse. After six months, they decide their love is lasting and they begin a sexual relationship that they both describe as fully consensual. Jane's father finds out about her sexual activity with Bill and he is outraged. Jane's father is a law professor and he insists that the prosecutor pursue criminal charges. While not physically abusive, Jane's father is authoritarian in the home and Jane has always been entirely submissive to her father's will. Because she does not have the strength to go against her father's wishes, Jane tells the prosecutor not to allow a suspended sentence for Bill.

These examples demonstrate how placing the burden on the victim can exacerbate a girl's powerlessness. Far from helping the girls in these

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<sup>264</sup> See *Turning Girls into Women*, *supra* note 15, at 69.

<sup>265</sup> For purposes of this hypothetical, it must be assumed that this sexual act is reported to law enforcement, investigated, and considered by the prosecutor even though the victim is uncooperative.

cases, placing the decision to prosecute on the shoulders of the victims would further several ills. Jane's subordination to her father is reinforced while her autonomy is not respected in making what she deems to be mature decisions about her personal relationships. Indeed, her submissive role is perpetuated by placing her in the impossible position where she must overcome an overbearing father in order to avoid punishing her boyfriend.

Likewise, Sally runs the risk of remaining under the control of her rapist. Even though all the evidence would tell an objective observer that Joe is manipulative and does not care for Sally's feelings, Sally may still wish to please him because she craves his attention. This type of victim is not likely to cooperate with a prosecutor even though she is most in need of protection. Under Oberman's proposal, if this victim indicates that she does not want to pursue charges or insists on a suspended sentence, then apparently the prosecutor would be bound by the victim's wishes. Far from empowering the victim, this girl's powerlessness is exacerbated when she bears the responsibility of making prosecutorial decisions.

Adding one more twist to this example demonstrates yet an even more serious problem with Oberman's configuration. Assume that Sally is a victim of intrafamilial sexual abuse perpetrated by her father. It is extremely common for sexual abuse victims to engage in sexually promiscuous behavior and to be revictimized,<sup>266</sup> thus helping explain her submission to Joe. Yet Sally's prior abuse and the accompanying family dynamics make her less likely to press charges against Joe.

Many of these dynamics are further illustrated by the tragically real case of *State v. Rife*.<sup>267</sup> In *Rife*, a sixteen-year-old girl's mother "kicked" her daughter out of the house and, subsequently, a forty-nine-year old man took the girl in.<sup>268</sup> In dissenting from the majority's view that a downward departure in sentencing could be made on the basis of the girl's voluntary participation, Judge Thompson points out the exploitive nature of the relationship:

During his trial, the minor testified that she and Rife had sex at least 60 times before he was appointed her guardian and at least 30 times after he was appointed her guardian. She also stated that Rife had proposed to her and they were to be married when she turned 18. She admitted introducing herself as his fiancée. Moreover,

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<sup>266</sup> See William N. Friedrich et al., *Child Sexual Behavior Inventory: Normative, Psychiatric and Sexual Abuse Comparisons*, 6 CHILD MALTREATMENT 37 (2001).

<sup>267</sup> 733 So. 2d 541 (Fla. Dist. Ct. App. 1999) (en banc), *affirmed*, *State v. Rife*, 2001 WL 359697 (Fla. 2001) (unpublished opinion).

<sup>268</sup> See *Rife*, 733 So. 2d at 548 (Thompson, J., dissenting).

she testified that she and Rife drank beer and smoked marijuana together, and that she liked and trusted him in spite of his overbearing behavior: he would not allow her to talk with her male friends and would not permit her to visit with any friends unless he approved them. He also threatened her. She finally reported that he was having sex with her when she could no longer tolerate his domination, and when he would not allow her to have a kitten, which was given to her by a police officer.<sup>269</sup>

Abundant literature demonstrates how victims often have a difficult time escaping abusive relationships.<sup>270</sup> Given the degree of power and control Rife had over his victim, it is conceivable that his control could have continued through the court process. It is likewise foreseeable that under Oberman's proposal, the victim would make the unwise decision to allow a deferred prosecution with no incarceration. Rather than being empowered to control her own sexual decision, this girl would be further subjected to the controlling power of an adult man.<sup>271</sup>

As the foregoing demonstrates, placing prosecutorial decisions on victims presents the real risk that a girl's weakness will be reinforced, this time in relation to an overbearing father or a manipulative perpetrator. Oberman's proposal might protect teenagers who are fully empowered and in ideal family situations, but it fails to provide a mechanism for protecting the teenager who is afraid, harassed, or under the influence of her offender.

Thus, the very population that Oberman claims is left out of the current system—the disempowered and most helpless—would only be further left out under her proposal. A girl from a well-educated and upper-income family is likely to have the support and resources to pursue a criminal case, while the lower-income, disenfranchised girl is not likely to gain access to a prosecutor. Thus, the proposed reform would serve only to perpetuate a system in which the concerns of the wealthy and powerful are heeded while the voice of the powerless is ignored.

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<sup>269</sup> *Id.* at 548–49.

<sup>270</sup> See, e.g., David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 AMER. J. OF ORTHOPSYCHIATRY 530 (1985).

<sup>271</sup> Perhaps Oberman would consider this in the category of “per se violations,” but, perhaps not. See *Regulating Consensual Sex*, *supra* note 15, at 779. She does not list a wide age disparity as one of the factors and, indeed, disparages the use of an age differential as a charging criteria elsewhere in her article.

#### 4. *Gender Exclusivity*

A final aspect of Oberman's reform proposal that needs to be addressed is the gender exclusivity of her recommendations. Oberman's central concern is that girls are uniquely vulnerable to sexual exploitation and that boys are uniquely prone to exploit vulnerable girls. She uses case studies<sup>272</sup> as well as social science literature to show how girls suffer from depression and anxiety more than boys, are more likely to attempt suicide, demonstrate "passive-aggressive" efforts to "communicate their desperation," and are rife with "self-doubt, insecurity and depression."<sup>273</sup> Although she recognizes that these traits are not uniform among all girls, she uses the literature to demonstrate why girls are particularly vulnerable and incapable of voluntarily consenting to sexual activity with boys.<sup>274</sup>

Her argument proceeds as follows. Girls are pressured by society to agree to engage in sexual activity with same-age boys, but their consent often is not meaningful.<sup>275</sup> Even though the sexual encounter may not rise to the level of being legally coercive, it is nonetheless problematic because it is not wholly voluntary.<sup>276</sup> For this reason, statutory rape laws should be used to prosecute cases involving female victims that fall into this "gray" area.<sup>277</sup> In this way, prosecutors can use the law to identify problematic sexual behavior that does not rise to the level of nonconsensual.<sup>278</sup> However, her articles make clear that the laws should be used only in a gender exclusive manner, protecting girls from exploitation by boys.<sup>279</sup>

Oberman's arguments often mirror the view expressed under the discredited patriarchal system<sup>280</sup> that numerous commentators—including Oberman—roundly and rightly criticize.<sup>281</sup> For example, her assertion that "girls consent to sex for foolish and mistaken reasons"<sup>282</sup> does

<sup>272</sup> See *id.* at 718–33.

<sup>273</sup> *Id.* at 714–15.

<sup>274</sup> See *Turning Girls into Women*, *supra* note 15, at 68–70.

<sup>275</sup> *Id.* at 69.

<sup>276</sup> *Id.* at 69–70.

<sup>277</sup> See *Regulating Consensual Sex*, *supra* note 15, at 733.

<sup>278</sup> See *Girls in the Master's House*, *supra* note 15, at 820–21.

<sup>279</sup> The titles alone make this clear: *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*; *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*.

<sup>280</sup> For examples of sexist language, see Phipps, *supra* note 14, at 34–37.

<sup>281</sup> See *Girls in the Master's House*, *supra* note 15, at 802–03; *Turning Girls into Women*, *supra* note 15, at 23–27.

<sup>282</sup> *Turning Girls into Women*, *supra* note 15, at 69. See also *id.* at 22 (Scientists "call[ ] into question the presumption that girls are fully capable of protecting themselves. . . ."); *Regulating Consensual Sex*, *supra* note 15, at 723 (discussing a girl's "inability to protect herself against being coerced to participate"); *id.* at 782 ("Immaturity and a lack of experience

not differ drastically from the view that girls are "unable to appreciate the enormity of this [sexual] offense."<sup>283</sup>

Such statements might be understandable if used to demonstrate underlying problems or sociological dynamics that could then be used to help formulate a definition of consent, a rape shield statute, or another discrete problem. Commentators regularly make good use of the social science data in developing novel recommendations.<sup>284</sup> However, Oberman uses the social science literature to draw categorical and stereotypical pictures of girls, and, from this, to create a *per se* rule that a teenage girl is not capable of meaningfully agreeing to sexual activity with a male peer.<sup>285</sup> Such a gender-exclusive approach is ill advised for three reasons.

First, advancing gender stereotypes does not help girls. Because the thrust of Oberman's proposed reform is that strict liability offenses should be used to protect the girls, her reform will occur only with the cooperation of prosecutors. Yet the message she is sending to these prosecutors is that girls are inherently weak and are not capable of making important decisions, thus threatening to reinforce existing stereotypical views of females and encourage paternalistic responses by prosecutors.

Second, advancing gender stereotypes is harmful to male victims. Literature on child sexual abuse makes it clear that a substantial number of boys are sexually abused. In one study, for example, twelve percent of boys in grades six through twelve reported experiencing unwanted

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not only render a girl vulnerable to coercion in a sexual encounter, it may also render her more likely to term the encounter 'nonconsensual.'").

<sup>283</sup> *Nider v. Commonwealth*, 131 S.W. 1024, 1027 (Ky. Ct. App. 1910).

<sup>284</sup> See, e.g., ESTRICH, *supra* note 8; Lynn M. Phillips, *Recasting Consent: Agency and Victimization in Adult-Teen Relationships*, in *NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT* 83, 88-99 (Sharon Lamb, ed. 1999); SCHULHOFER, *supra* note 8; CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM* (1992).

<sup>285</sup> Research demonstrates the difficulty in assessing whether a teenager's consent to sexual activity is meaningful. Pregnant girls tend to describe themselves as capable of making a decision about whether to engage in sexual activity. See Joanna Gregson Higginson, *Defining, Excusing, and Justifying Deviance: Teen Mothers' Accounts for Statutory Rape*, 22 *SYMBOLIC INTERACTION* 25 (1999). Higginson talked with teenage mothers about their ability to consent to sexual activity with older males. Most of them described their relationships with men as fully voluntary.

Researcher Lynn Phillips provides similar evidence of what teenage girls say about their sexual activity, but she demonstrates the complexity in assessing whether conduct is consensual. While the adolescents she interviewed tended to indicate that they were capable of making responsible decisions, adult women said, in retrospect, that significant power imbalances were present in their relationships as teenagers. See Lynn M. Phillips, *Recasting Consent: Agency and Victimization in Adult-Teen Relationships*, in *NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT* 83, 88-99 (Sharon Lamb, ed. 1999).

sex.<sup>286</sup> Of these, approximately twelve percent involved sex that the researchers classified as child abuse, and eight percent involved force.<sup>287</sup> It is clear that both pre-pubertal and post-pubertal boys experience sexual activity that they do not want. Gender exclusive treatment of child sexual abuse will result in boys who are not protected from exploitation.

Third, gender exclusive language is not necessary. Since the problem of coercive sexual activity can be addressed in gender inclusive language that would protect boys as well as girls, there is no need to do otherwise.

In the context of adult rape, feminist literature has forged the way to legal reform.<sup>288</sup> Women are overwhelmingly the victims of rape, and men are overwhelmingly the perpetrators.<sup>289</sup> Men historically have dominated positions of political power, failing over the course of centuries to enact strong protections for rape victims. Clearly, without strong feminist advocacy, rape statutes never would have been reformed. When the subject involves defining substantive crimes against adolescents, though, it must be recognized that pre-pubescent boys are victims of sexual abuse at a disturbing rate and, even as they develop through adolescence, boys continue to be sexually victimized.<sup>290</sup> While it is entirely appropriate to recognize the unique difficulties faced by adolescent girls, the focus of legislative reform involving teenagers should be on adolescents as a whole, not on boys or girls exclusively.

#### D. SUMMARY

Although Oberman sets out to "repair the fault lines in the construction and implementation of contemporary statutory rape laws,"<sup>291</sup> she fails to establish that these fault lines exist. While she demonstrates that

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<sup>286</sup> Pamela I. Erickson & Andrea J. Rapkin, *Unwanted Sexual Experiences Among Middle and High School Youth*, 12 J. OF ADOLESCENT HEALTH 319, 320 (1991). In this study, researchers asked: "Did you ever have a sexual experience (or sexual intercourse) with someone when you did not want to?" Among males, approximately one-third of the sex classified as "unwanted" was described by the men to be sex that was later regretted. *Id.* Thus, in this study, unwanted is not necessarily forced or non-voluntary sex.

<sup>287</sup> *Id.*

<sup>288</sup> See SCHULHOFER, *supra* note 8, at 29-33.

<sup>289</sup> See LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 2 (1997) (reporting that ninety-nine percent of perpetrators are male and ninety-two percent of victims are female). This report does not separate acts that occurred during childhood from acts of nonconsensual adult rape, so it is likely the rates of victimization of adult males is even lower. See also PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 14 (2000). Tjaden & Thoennes estimate that three percent of men and 17.6 percent of women are raped during their lifetime. Again, however, this figure includes childhood victimization, so it does not provide a precise number of males who are victims of forcible or nonconsensual rape as adults.

<sup>290</sup> See Erickson & Rapkin, *supra* note 285, at 321.

<sup>291</sup> *Regulating Consensual Sex*, *supra* note 15, at 706-07.

investigators and prosecutors at times make poor decisions on whether to enforce existing law, she does not establish that the substantive criminal law itself is fundamentally flawed, nor does she provide persuasive evidence that, nationwide, prosecutors systematically use improper mechanisms for screening and prioritizing cases.<sup>292</sup> Further, by focusing her reform proposal on an overbroad use of a strict liability criminal law to address a discrete type of wrongful behavior—coercing another into sexual acts—Oberman selects the wrong remedy to the problem. She then selects inappropriate agents—the victims themselves—to carry out the reform. In the end, therefore, the reform fails to empower victims but rather threatens to perpetuate the very stereotypes and indiscriminate exercise of discretion that Oberman fears.

### III. AN ALTERNATIVE APPROACH

The difficulty in prosecuting coercive teenage sexual behavior is not that prosecutors use improper mechanisms for screening and prioritizing cases. Nor is it a problem of statutory construction.<sup>293</sup> Rather, the statutes in most states are fundamentally sound and the criteria used by prosecutors are sensible. Therefore, the criminal law in most states does not need to be reconfigured or repaired.

At the same time, current statutes are not water tight, and thus there continues to be room for improvement. The following recommendations focus on a narrow range of issues that, if improved, could lead to meaningful reform that would better protect teenagers from coercive sexual activity.

#### A. CLARIFY THE ISSUE

Before forming a response to a perceived problem, it is first necessary to understand the problem. For this reason, the following section establishes six categories of conduct that should be distinguished from each other. The law applicable to each category is provided, along with

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<sup>292</sup> Abundant social science research makes it is clear that prosecution of sexual crimes against teenagers is difficult because rape is under-reported and it is factually difficult to prove at trial. See LEVESQUE, *supra* note 1, at 233 (summarizing the research as concluding that the “vast majority of sexual assault victims do not report their victimization”). Child protection and rape victim advocates have attempted to address the problem of low reporting for many years, and numerous potential solutions have been advanced. See LEVESQUE, *supra* note 1, at 233–34; Rochelle F. Hanson et al., *Factors Related to the Reporting of Childhood Rape*, 23 CHILD ABUSE & NEGLECT 559 (1999). Nonetheless, identifying cases remains a persistent problem. See also Bryden & Lengnick, *supra* note 8, at 1220–63 (discussing problems in reporting and problems of proof).

<sup>293</sup> See *Regulating Consensual Sex*, *supra* note 15, at 706–07 (stating that Oberman is setting out to “repair the fault lines in the construction and implementation of contemporary statutory rape laws”).



examples of legislation that address the conduct described in the category.

1. *Category One: A Pre-Pubertal Victim and an Adult Defendant*<sup>294</sup>

Without exception, the law in all fifty states prohibits sexual activity between an adult and a pre-pubertal child.<sup>295</sup> While there is little debate over the fundamental legitimacy of these statutes,<sup>296</sup> a persistent difficulty is establishing the age cut-off for the victims. Though the age cut-offs are not uniform around the country, they attempt to identify an age at which children move out of puberty.<sup>297</sup> As a result, these statutes generally establish an age that is low enough—generally “under fourteen” or “under thirteen”—that a reasonable person would not be mistaken about the child’s age.<sup>298</sup> Thus, statutes addressing cases in this category reflect a societal perception that pre-pubertal children should never be placed in situations in which they must determine whether to enter into a sexual relationship with an adult.

While force<sup>299</sup> or nonconsent is not an issue in these statutes, the use of force typically may be considered an aggravating factor in sentencing.<sup>300</sup> Therefore, an adult who molests a seven-year-old and injures the child or uses a weapon in the process of molesting the child faces enhanced punishment. It is not necessary in such cases to prove that the

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<sup>294</sup> In this section, I use the terms “victim” and “defendant” to represent the two participants to sexual activity. In some cases, more accurate terms would be “potential victims” and “potential defendants,” since the conduct described is not necessarily criminal. Likewise, a juvenile perpetrator is more accurately described as a “delinquent.” Because use of these terms in this context would be unnecessarily cumbersome, I use the labels “victim” and “defendant” to provide easily understandable classifications.

<sup>295</sup> For a thorough discussion of these laws, see Phipps, *supra* note 14, at 72–77.

<sup>296</sup> An occasional case will test the limits of this category of cases. For example, a Maryland prosecutor received significant negative publicity for failing to prosecute a twenty-nine-year-old man for sexual acts with a thirteen-year-old. Because the two got married with the permission of the girl’s parents, the local prosecutor did not file charges. See Amy Argetsinger, *Girl, 13, Marries Into Controversy*, WASH. POST, Sept. 29, 1998, at A1. The following year, the Maryland legislature passed a law prohibiting anyone under fourteen from marrying. See Amy Argetsinger, *Assembly Votes to Ban Some Teen Marriages*, WASH. POST, April 11, 1990, at C4. The outrage prompted by this case as well as the prompt response by the legislature demonstrates that cases falling within Category One are nearly universally viewed as inherently wrongful.

<sup>297</sup> The drafters of the Model Penal Code, worried about the strict liability nature of the offense, set the age at ten. See MODEL PENAL CODE § 213.1. For a discussion of the Model Penal Code approach, see Phipps, *supra* note 14, at 19–20.

<sup>298</sup> See Phipps, *supra* note 14, at 58. States have not followed the lead of the Model Penal Code in this area, opting instead to consider the stage of pre-pubescence more broadly.

<sup>299</sup> I use the terms “force” and “coercion” to describe an act of force or coercion beyond the coercion inherent in sexual activity between an adult (or older juvenile) and a younger child. See Phipps, *supra* note 14, at 42, for additional discussion.

<sup>300</sup> See *id.* at 70.

child is an unwilling participant, only that the defendant uses a weapon or in some other manner makes a display of force. Due to the young age of the victims, a reasonable mistake of age defense does not exist for offenses involving this category of victims.<sup>301</sup>

Oddly, Oberman mingles within her discussion victims who fall within Category One. Most unusual is her use of a case from Chicago in which the victims were eleven and twelve.<sup>302</sup> While she uses this as an example of "intimidation and 'consensual' sex," there is generally no dispute as to whether an eleven-year-old can enter into a consensual sexual relationship with an adult.<sup>303</sup> The statutes around the country are uniform on this point in identifying such conduct as child sexual abuse,<sup>304</sup> and a discussion of "consensual sex between teenagers" needs to recognize the difference between pre-pubertal and post-pubertal victims. While the law demonstrates some (though not much) flexibility when an adult engages in sexual activity with a post-pubertal minor, the law in every state is uncompromising toward an adult who engages in sexual activity with a pre-pubertal child.<sup>305</sup>

## 2. *Category Two: A Pre-Pubertal Victim and a Defendant Who Is a Post-Pubertal Minor*

As with sexual activity between a pre-pubertal child and an adult, the law presumes that sexual activity between a pre-pubertal child and a post-pubertal teenager is inherently harmful and, therefore, wrong regardless of whether the participants claim the conduct is voluntary.<sup>306</sup> That is, if the post-pubertal defendant engages in sexual activity with a pre-pubertal child, coercion is presumed based solely on the age difference between the two participants. In most states, these statutes make no mention of a minimum perpetrator age or of an age differential,<sup>307</sup> though a few states require the older juvenile to be a specified number of years older than the pre-pubertal child for an offense to be committed.<sup>308</sup> As with offenses involving adult defendants, the presence of physical

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<sup>301</sup> See Phipps, *supra* note 14, at 51–52.

<sup>302</sup> See *Regulating Consensual Sex*, *supra* note 15, at 719–20. Oberman does not state whether the perpetrators of the offenses were adults, indicating only that they were "older teens." As mentioned previously, the failure of law enforcement to pursue this case is entirely unjustifiable. Failure of officers to enforce the law, though, does not demonstrate that the law itself is flawed.

<sup>303</sup> See app. B (listing statutes).

<sup>304</sup> In many states the thirteen-year-old victims in *Hemme* and *Smith* would fall into Category One as well, and the nineteen-year-old perpetrators would qualify as adults. See *Regulating Consensual Sex*, *supra* note 15, at 721–24.

<sup>305</sup> See Phipps, *supra* note 14, at 55–58.

<sup>306</sup> See *id.* at 65–66 (discussing statutes).

<sup>307</sup> See app. B.

<sup>308</sup> See Phipps, *supra* note 14, at 66.

force or coercion may be either an aggravating factor or a separate offense.<sup>309</sup>

The reasoning behind these statutes is that sexual activity by a pre-pubertal child is not a normal part of a child's development and, therefore, is inherently harmful regardless of the child's expression of willingness.<sup>310</sup> At times, prosecutions in this category raise concerns in the public—particularly when the offense is very serious and the participants are of similar age—but for the most part the victims in these cases are young enough that any sexual activity with these children is accepted by most people to be per se problematic.<sup>311</sup>

### 3. *Category Three: A Pre-Pubertal Victim and a Pre-Pubertal Defendant*

As with Category Two, cases involving two pre-pubertal children are viewed as inherently harmful. Although neither pre-pubertal child is likely to be dealt with harshly by the criminal justice system, intervention generally is deemed to be warranted because of the abnormality of children this age being sexually active.<sup>312</sup> Social science research demonstrates that pre-pubertal children are not likely to be engaged in sexual activity with other pre-pubertal children, but rather, older adolescents or adults prey on young children.<sup>313</sup> Indeed, sexual activity by young children often is a signal to child protection professionals that the child may be a victim of abuse by an adult.<sup>314</sup>

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<sup>309</sup> See *id.* at 70.

<sup>310</sup> This reasoning is supported by the literature. See Jon A. Shaw et al., *Child on Child Sexual Abuse: Psychological Perspectives*, 24 CHILD ABUSE & NEGLECT 1591 (2000) (Young children sexually abused by older children manifested the same level of adverse responses as did young children sexually abused by adults.). See also Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 AMER. CRIM. L. REV. 279 (1998).

<sup>311</sup> See, e.g., *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998) (upholding the constitutionality of criminal statute applied to two fifteen-year-old boys who engaged in sexual activity with twelve-year-old girls).

<sup>312</sup> See Susan M. Kole, *Statute Protecting Minors in a Specified Age Range from Rape or Other Sexual Activity as Applicable to Defendant Minor Within Protected Age Group*, 18 A.L.R.5TH 856 (1994).

<sup>313</sup> See Harold Leitenberg & Heidi Saltzman, *A Statewide Survey of Age at First Intercourse for Adolescent Females and Age of Their Male Partners: Relation to Other Risk Behaviors and Statutory Rape Implications*, 29 ARCHIVES OF SEXUAL BEHAVIOR 203 (2000) (discussing how the average age of partners is much older for children whose first sexual intercourse is at a young age).

<sup>314</sup> See William N. Friedrich et al., *Child Sexual Behavior Inventory: Normative, Psychiatric and Sexual Abuse Comparisons*, 6 CHILD MALTREATMENT 37 (2001).

4. *Category Four: A Post-Pubertal Victim Who Is Below the Age of Consent and an Adult Defendant*

Categories Four, Five, and Six reflect the reality that the criminal law treats post-pubescent victims differently from pre-pubescent victims. While post-pubertal minors are still deemed incapable of consenting to sexual activity with adults,<sup>315</sup> the fact that they have reached puberty generally translates into lower criminal penalties for those who engage in sexual activity with victims in this category.<sup>316</sup> Because the age of consent in the majority of states is sixteen, this means that the Category Four victim generally is one aged fourteen or fifteen.<sup>317</sup>

Just as in Category One, aggravating factors such as injury to the victim, the use of a weapon, or the abuse of a position of authority may increase the punishment.<sup>318</sup> Likewise, when force is used, prosecutors may choose to charge under a forcible rape statute that provides greater punishment.<sup>319</sup> In a small minority of states, a defendant may claim a reasonable mistake of age defense when the victim is a post-pubertal minor.<sup>320</sup>

5. *Category Five: A Post-Pubertal Victim Who Is Below the Age of Consent and a Post-Pubertal Defendant Who Is Below the Age of Consent*

In most states, sexual activity between post-pubertal minors is excluded from the criminal law so long as both are willing participants, regardless of whether one of them is below the age of consent.<sup>321</sup> As has been discussed previously, most states accomplish this by creating an age differential requirement—when two post-pubescent minors are of comparable age and the sexual activity is voluntary, then no criminal offense

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<sup>315</sup> See Phipps, *supra* note 14, at 58–62.

<sup>316</sup> See *id.* at 72–77. In South Carolina, the law was changed in reaction to the arrest of seventeen-year-old basketball star for engaging in sex with his fifteen-year-old girlfriend. (In South Carolina, seventeen-year-olds are considered adults for purposes of the criminal law). Apparently in recognition of the fact that sexual activity between teenagers of this age is not unusual, the law was changed to substantially decrease the applicable sentence when the victim is fifteen. See S.C. CODE ANN. § 17-25-45(C)(1) (Supp. 2001) (removing the offense from the list of “most serious” offenses if the act involved consensual sex). For background on this amendment, see Clif LeBlanc & Cindi Ross Scoppe, *Young Love Wins Round in House*, THE STATE (Columbia, SC), May 2, 1996, at B4.

<sup>317</sup> See appendix A for a list of the age of consent in each state.

<sup>318</sup> See *id.* at 70.

<sup>319</sup> See *id.* at 58–62.

<sup>320</sup> See Phipps, *supra* note 14, at 52 n.219.

<sup>321</sup> See *supra* notes 112–16 and accompanying text.

is committed.<sup>322</sup> A few states prohibit all sexual activity between post-pubertal minors when one of them is under the age of consent.<sup>323</sup>

As with the other categories, when coercion is present in a sexual encounter between teenagers in this age range, every state has a criminal statute holding the coercive party criminally accountable. In such cases, rather than presuming coercion based on the age of one of the participants, actual coercion—whether it be force or nonconsent—must be proven.<sup>324</sup>

6. *Category Six: A Post-Pubertal Victim Who Is Below the Age of Consent and a Post-Pubertal Minor Defendant Who Is at or Above the Age of Consent*

The factor distinguishing Category Five from Category Six is the age of the defendant. Category Five addresses juvenile defendants who are under the age of consent (in most states, this translates into fourteen- and fifteen-year-olds), while Category Six addresses those who are still juveniles, yet are at or above the age of consent (in most states, defendants who are sixteen or seventeen). In spite of the fact that a fifteen-year-old defendant may be presumed incapable of consent while a sixteen-year-old might be deemed capable of consenting, this legal presumption does not translate into any practical difference in the way either juvenile would be treated as a defendant. Thus, in most states, a fifteen-year-old defendant is likely to be in the same legal position as a sixteen-year-old defendant, even though one can legally consent and the other cannot.

An understanding of the legal significance of these six categories helps narrow the scope of a discussion of whether voluntary sexual activity between teenagers should be criminalized. First, conduct involving victims in Category One, Two, or Three should not fall within a discussion of whether adolescents can voluntarily agree to participate in sexual activity.<sup>325</sup> In the vast majority of states, any sexual activity that falls within one of these categories is deemed the most serious child sexual abuse offense, regardless of the defendant's age.<sup>326</sup> Prosecutors do not examine whether the children were boyfriend or girlfriend, or whether

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<sup>322</sup> See *supra* notes 115–16 and accompanying text.

<sup>323</sup> See *supra* notes 117–19 and accompanying text. See also app. C. The labels “defendant” and “victim” are particularly troublesome in this context since in these states the participants may be both defendant and victim.

<sup>324</sup> See app. D.

<sup>325</sup> See *Regulating Consensual Sex*, *supra* note 15, at 719–20 (discussing a case involving eleven- and twelve-year-old victims); *id.* at 721–23 (discussing a case involving a thirteen-year-old victim); *id.* at 724–25 (discussing a case involving a thirteen-year-old victim).

<sup>326</sup> See Phipps, *supra* note 14, at 58. In many states, fourteen-year-olds are included in this category. *Id.*

there was subtle coercion. Any sexual activity is a *per se* offense. Likewise, all conduct falling within Category Four can be excluded from the discussion since, in most states, once the older party reaches adulthood, that person is criminally liable for any sexual activity with an underage child.<sup>327</sup>

Thus, the issue of greatest concern is conduct involving Categories Five and Six—sexual activity between two post-pubertal teenagers who are not yet adults. Given that the age of consent is sixteen in the majority of states, the issue can be stated in even more precise terms: How should criminal statutes be written to respond to sexual activity between minors who are fourteen and fifteen years old when the other participant is a minor of comparable age?

#### B. CLARIFY THE LANGUAGE

Just as important as the need to clearly identify the issue is the need to use clear language when discussing the issue. While several conceptual difficulties are inherent but unavoidable in a discussion of minors “consenting” to sexual activity,<sup>328</sup> the term “statutory rape” is one that continues to be unnecessarily problematic.

The legal literature discussing sexual offenses against adolescents is replete with various uses of the term “statutory rape.” When the offense was first created, the term referred to the *statutory* offense of rape that contrasted with the *common law* offense of rape.<sup>329</sup> That is, “statutory rape” described any sexual intercourse with a minor under the age of consent, whether the victim was five or fourteen. As the age of consent increased over the years, though, the term came to be used to describe only sexual activity between an adult male or older adolescent and an underage teenage female. Thus, as commonly used today, the term “statutory rape” is not used to describe the molestation of a five-year-old even though this conduct fits within a technical definition of the term (that is, the act is rape by operation of a statute declaring rape to be any sexual intercourse with a person under the age of consent). Rather, commentators typically use the term to refer to sexual activity between an older adolescent female and a man or an older adolescent male.<sup>330</sup>

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<sup>327</sup> Of course, perceptions of unfairness arise when the age of consent is high and penalties are severe. To this extent, laws in some states may need to be amended to maintain a sense of proportionality between the conduct and punishment. See Oliveri, *supra* note 11, at 506–07.

<sup>328</sup> See *supra* note 19 (discussing problems with the term “consent”).

<sup>329</sup> See FEINBERG, *supra* note 19, at 8–12 (discussing the history of the offense).

<sup>330</sup> See, e.g., Guerrina, *supra* note 12 (focusing on teenage girls); Hollenberg, *supra* note 11 (focusing on “teenage motherhood”); Kitrosser, *supra* note 12, at 326 (focusing on teenage girls); Oliveri, *supra* note 11, at 499 (focusing on teenage girls). Oberman’s focus likewise is on sexual activity between teenage girls and older boys or men.

Because the term "statutory rape" has one technical meaning and another colloquial meaning, the term should be used with care.<sup>331</sup> In most instances, the term "child sexual abuse" more appropriately describes conduct involving adults who engage in sexual activity with minors under the age of consent or conduct involving an adolescent and a pre-pubertal child. Likewise, "rape" is the most accurate description of nonconsensual or forcible sexual activity.<sup>332</sup>

In addition to clarifying the discussion, attention to accurate language accomplishes two societal goals. First, the terms "child sexual abuse" and "rape" clearly stigmatize behavior as wrongful, labeling the perpetrator either as one who molests children or one who forces another to engage in acts of sexual penetration. Consider, for example, the numerous examples of indefensible male conduct provided by Oberman. The members of the Spur Posse committed rape, not statutory rape; the older adolescents in the Chicago case sexually abused eleven- and twelve-year-old children; and Joshua Hemme raped two girls. Likewise, the forty-nine-year-old man in *Rife* is a child sexual abuser, not a man who was trapped by a seductive teenager into the crime of statutory rape. Accurate labeling places a strong stamp of societal disapproval on criminal conduct.<sup>333</sup>

A second benefit of using appropriate terminology is that it provides an intuitive gauge by which to measure the wrongfulness of the sexual behavior. If society's reaction to a particular act is "that's wrong, but it's not child sexual abuse," then this reaction should cause policymakers to pause and reconsider whether the prohibited conduct is appropriately circumscribed.<sup>334</sup> Applied to the act of voluntary sexual activity between two teenagers, this test is telling. Labeling voluntary activity between two teenagers as "rape" or "child sexual abuse" would strike most people as incongruent.<sup>335</sup> Using accurate terminology in this way, therefore, allows policymakers to gauge the degree to which the prohibited conduct is consistent with societal norms.

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<sup>331</sup> For additional discussion of the problems with this term, see Phipps, *supra* note 14, at 41-43. See also SCHULHOFER, *supra* note 8, at 101-02 (complaining about inaccurate use of the term); English & Teare, *supra* note 193, at 830 (noting that statutory rape is "a somewhat imprecise term").

<sup>332</sup> Very few states retain use of the term "statutory rape" as the label for a crime defined by statute. See, e.g., Mo. Rev. Stat. Ann. § 566.034 (West Supp. 2002). In these states, therefore, the term has a precise legal definition and thus conveys a particular meaning in that state.

<sup>333</sup> See PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 143 (1997).

<sup>334</sup> See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 5-7 (1995).

<sup>335</sup> In fact, the label that accurately describes fully voluntary sexual activity between minors is "fornication." See S.C. CODE ANN. §§ 16-15-60-16-15-80 (1985) (defining the offenses of adultery and fornication).

As the above discussion demonstrates, baseline definitional matters are important. It is difficult to discuss legal issues in a consistent manner when the underlying matters are not precisely stated. Moreover, the criminal law has no hope of affecting societal conduct when the scope of the criminal law is unclear. It is vital, therefore, that legal commentators use clear language when discussing sexual crimes against teenagers.

C. DETERMINE AN APPROPRIATE ROLE FOR STRICT LIABILITY OFFENSES

Once the topic under discussion is clarified, the next step for legal commentators and policymakers is to determine the proper role for strict liability offenses. Oberman proposes that strict liability sex offenses be broadly used by prosecutors to apply to conduct they perceive as coercive. While I have argued strongly against such a use of a strict liability offense,<sup>336</sup> the use of strict liability offenses to regulate the conduct of adolescents is not wholly indefensible (at least at a theoretical level).

The use of a strict liability offense to regulate consensual sexual activity between teenagers is at least theoretically defensible if these offenses are strictly and uniformly enforced. Strict enforcement means establishing a bright line rule that a minor under the age of consent can never consent to sexual activity and then uniformly enforcing that rule. In effect, this view is a variation of Oberman's call to return to the use of strict liability offenses, but with one important difference. Rather than being used selectively as Oberman proposes, the laws would be applied in a non-discretionary manner—any person who engages in sexual activity with a person under the age of consent is always prosecuted. Strict enforcement of strict liability offenses under these conditions is appealing for several reasons.

First, strict enforcement sends a single, clear message that teenagers can understand. Rather than sending a conflicting message to teenagers (i.e., "You cannot lawfully engage in sexual intercourse, except under the following circumstances . . ."), strict enforcement establishes an unmistakable rule about what constitutes criminal conduct. A law that is easily understood and consistently enforced is more likely to have a deterrent effect than a law that has many qualifications. Thus, assuming that one of the societal goals is to lower the rate of teenage sexual activity, a strict enforcement approach arguably could impact teenage sexual activity. The alternative—setting an age of consent and then exempting voluntary teenage sexual activity—is not likely to reduce the prevalence of teenage sexual activity.

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<sup>336</sup> See *supra* notes 224–43 and accompanying text.



Second, strict enforcement of strict liability offenses eliminates the reliance upon broad prosecutorial discretion. Under such a scheme, all cases would be categorically prosecuted with the understanding that no minor under the age of consent—rich or poor, black or white—should be making decisions about sexual activity. Similarly, prosecutors would not have to make difficult decisions about culpability or whether age-span or other elements of an offense have been met, mandatory reporters would not have to make judgments about whether a crime took place, and an under-age adolescent would have an easy answer to another adolescent who wants to engage in sexual activity. Bright line rules allow for easy decisionmaking.

Third, a strict enforcement approach would not require a complicated redrafting of statutory provisions. In effect, the law in twelve states would be retained, and, in the remaining states, existing age span provisions would be eliminated. No controversial debate over the definition of consent would be necessary. This is one proposal that legislators could readily understand and draft with relative ease.

Fourth, strict enforcement is arguably feasible. While the number of potential crimes that would result with this approach is extremely large, it is not out of proportion with other conduct deemed criminal in the United States. Using the 1990 population figures and the assumption that forty-three percent of girls are sexually active by age sixteen, there are (or were in 1990) about 1.3 million sexually active girls aged fourteen or fifteen.<sup>337</sup> Considering that an estimated six million assaults and 3.6 million household burglaries take place each year in the United States,<sup>338</sup> one could perhaps argue it is reasonable to require the criminal justice system to police approximately one million instances of sex involving fourteen- and fifteen-year olds.<sup>339</sup>

Finally, strict enforcement could further several legitimate societal aims. A defensible argument can be made that minors under the age of sixteen cannot appreciate the consequences of a decision to engage in

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<sup>337</sup> BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS, UNITED STATES 17, tbl.13 (1992). Using different assumptions could alter this figure to just under one million. Leitenberg and Saltzman, for example, indicate that thirty-one percent of their sample were sexually active by age fifteen. Leitenberg & Heidi Saltzman, *A Statewide Survey of Age at First Intercourse for Adolescent Females and Age of Their Male Partners: Relation to Other Risk Behaviors and Statutory Rape Implications*, 29 ARCHIVES OF SEXUAL BEHAVIOR 203, 208 (2000). Although this figure counts only girls, it is not necessary to count boys since the targeted conduct is the single instance of sex involving one boy and one girl. Thus, the number essentially is an estimate of the number of "potential crimes" that would be created if a strict liability rule were enforced.

<sup>338</sup> See CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 2000 at 3 (2001).

<sup>339</sup> Given the degree of sexual activity of American teenagers, though, a policy of strict enforcement would become unreasonable if the age of consent were raised to seventeen or eighteen.

sexual activity<sup>340</sup> and that they are less likely to use adequate protections during sexual activity and thus more likely to become pregnant or to contract sexually transmitted diseases.<sup>341</sup> Such evidence provides adequate justification to categorically prohibit all sexual activity by teenagers under sixteen.

In spite of these arguments in favor of strictly enforcing strict liability offenses, considerably stronger reasons counsel against adoption of this approach. Most significantly, sociological research makes it clear that Americans have moved away from viewing voluntary sexual activity between teenagers as a crime. In light of the fact that thirty-eight states have removed voluntary teenage sexual activity from the criminal law and that prosecution of such activity is rare in the remaining twelve states that retain such statutes, it is hard to foresee these states reversing their policies to place voluntary sexual activity back within the reach of prosecutors.<sup>342</sup> Although many in the United States view sex between unmarried people as immoral,<sup>343</sup> a majority believe that sex between willing participants is morally acceptable.<sup>344</sup> Societal forces appear to be moving irreversibly against the trend to criminalize voluntary sexual activity between teenagers.<sup>345</sup>

Even if the political will existed to re-criminalize the conduct, active enforcement of such laws would be highly unlikely. Given the limited resources in police and prosecutor offices—as well as societal norms

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<sup>340</sup> See, e.g., *Turning Girls into Women*, *supra* note 15, at 68–69.

<sup>341</sup> See *id.* at 62.

<sup>342</sup> A series of Florida decisions reflects the tension created by laws that deem older adolescents incapable of consenting to sexual activity. See *State v. Rife*, 2001 WL 359697 (Fla. 2001) (unpublished opinion), *affirming* *State v. Rife*, 733 So. 2d 541 (Fla. Dist. Ct. App. 1999) (*en banc*) (allowing the consideration of a victim's willingness or consent as a mitigating factor at sentencing when the victim is seventeen and the defendant is twenty-nine); *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998) (upholding the constitutionality of a criminal statute applied to two fifteen-year-old boys who engaged in sexual activity with twelve-year-old girls); *B.B. v. State*, 659 So. 2d 256 (Fla. 1995) (holding a criminal statute unconstitutional as applied to a sixteen-year-old who engaged in sexual activity with another sixteen-year-old); *Jones v. State*, 640 So. 2d 1084 (Fla. 1994) (upholding the constitutionality of a criminal statute applied to eighteen- nineteen- and twenty-year old males who engaged in sexual activity with fourteen-year-olds); see also Roberto Suro, *Town Faults Law, Not Boy in Sex Case*, WASH. POST, May 11, 1997, at A1 (discussing the community reaction to prosecution of an eighteen-year-old in Wisconsin who impregnated his fifteen-year-old girlfriend).

<sup>343</sup> See SEX, LOVE, AND HEALTH IN AMERICA, *supra* note 125, at 22 (noting that approximately thirty percent of U.S. society considers sex appropriate only in marriage).

<sup>344</sup> Seventy percent of the U.S. population believes either that sex is always acceptable if it does not hurt someone or that sex is acceptable so long as the participants are in love. It is reasonable to assume from this that most people in the country do not believe such conduct should be criminalized. See SEX, LOVE, AND HEALTH IN AMERICA, *supra* note 125, at 22 (stating that twenty-five percent of Americans have a “recreational” view of sex and forty-five percent have a “relational” view of sex).

<sup>345</sup> See ROBINSON & DARLEY, *supra* note 332, at 5–7 (discussing problems with criminal laws that are inconsistent with prevailing societal norms).

of what constitutes acceptable sexual activity—few jurisdictions would have the desire or the ability to aggressively pursue these cases. Shifting resources to policing voluntary sexual activity among this age group would run the risk of diminishing resources devoted to prosecuting acts of rape and child sexual abuse. More difficult than the problem of enforcement is the problem of detection. It is difficult enough to discover child sexual abuse and rape under existing law. Without massive police action to monitor sexually active adolescents, it is highly unlikely that voluntary sexual activity between teenagers would come to the attention of authorities. An aggressive effort to root out cases would not only be costly and time consuming, it would make it less likely that teenagers would seek health care and contraception, further exacerbating societal problems.

Finally, the implications of a strict enforcement approach may likely be too uncomfortable for many people. A strict enforcement policy would mean that any time one participant to sexual activity is below the age of consent, the other person is always a criminal defendant. No exceptions could be made based on the degree of “true love” or the gender of the other person. Likewise, if both participants are under the age of consent, both would be prosecuted. Since no child under the age of consent could consent to sexual activity, then anyone (including another child) engaging in sexual activity with this person would be committing an offense.

For these reasons, the strategy of using strict liability offenses to prosecute voluntary sexual activity between teenagers is not likely to be relied upon as the primary reform mechanism for protecting teenagers in most states. Instead, the modern trend—exempting voluntary sexual activity between teenagers from the reach of the criminal law—is much more likely to continue. A consequence of the modern trend, though, is the centrality of the definition of the crime of rape. In particular, the question of what constitutes coercion is critical for protecting teenagers from being raped by other teenagers.

#### D. DEFINE THE WRONGFUL CONDUCT

Recognizing that the modern trend represents the current status and the likely future of the law in the United States, the focus of law reform returns to a definition of coercion that adequately protects teenagers. Fortunately, this is not a novel issue that must be addressed with an entirely new approach, as considerable work has been under way for many years on how to identify nonconsensual sexual activity between

adults.<sup>346</sup> Much of this work is directly applicable to coercive sexual activity between teenagers.

One thoughtful recommendation is Professor Stephen Schulhofer's proposal that consent must be affirmatively given.<sup>347</sup> Schulhofer reasons that respect for a person's sexual autonomy requires nothing less than "positive willingness, clearly communicated." Thus, the state would have to prove that the defendant did not have permission, and the victim's silence would not be evidence of permission.<sup>348</sup> Such an approach has much to commend it in the context of sex between teenagers. It accounts for the dynamics of victimization that Oberman notes; it establishes a clear rule that teenagers can understand; and it creates a relatively objective requirement that prosecutors can examine in assessing a case. Moreover, Schulhofer recommends this be a separate offense that would supplement forcible rape statutes.<sup>349</sup> While some commentators are critical of Schulhofer's proposal,<sup>350</sup> a thorough examination of his recommendation as applied to teenagers would be a welcome debate.

Heidi Kitrosser also presents a meaningful reform proposal for addressing the problem of consent in sexual encounters between teenagers. Kitrosser argues for defining consent as "some manifestation of cooperation in the act or an attitude pursuant to an exercise of free will."<sup>351</sup> Similar to Schulhofer, she would require proof of the "act or attitude" to "manifest itself in words or actions indicating freely given agreement to engage in sex."<sup>352</sup> More controversially, Kitrosser argues for the creation of a rebuttable presumption of nonconsent within specified age spans.<sup>353</sup> While this proposal is not without its difficulties, Kitrosser accurately identifies the central issue—the definition of consent—and presents solutions that directly respond to this issue.

The proposals of Schulhofer and Kitrosser represent only two of several reform proposals that have been advanced in the literature.<sup>354</sup>

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<sup>346</sup> See, e.g., SCHULHOFER, *supra* note 8, at 254–73 (discussing consent in dating). For an overview of the major reform proposals, see Bryden, *supra* note 242.

<sup>347</sup> SCHULHOFER, *supra* note 8, at 271.

<sup>348</sup> *Id.* A different standard would make intercourse illegal "when the other party's non-consent is 'either obvious from the circumstances or else manifested by physical or verbal resistance prior to intercourse.'" Bryden, *supra* note 242, at 396. This is a variation of the "no means no" approach. See ESTRICH, *supra* note 8, at 102–03.

<sup>349</sup> *Id.* at 293 (Schulhofer's Model Criminal Statute for Sexual Offenses retains a more serious forcible rape statute while creating the separate offense of Sexual Abuse.); see also Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously*, 11 LAW & PHIL. 35, 67 (1992).

<sup>350</sup> See Bryden, *supra* note 242, at 402–11.

<sup>351</sup> Kitrosser, *supra* note 12, at 329 (punctuation omitted).

<sup>352</sup> *Id.*

<sup>353</sup> See *id.* at 327–33.

<sup>354</sup> See also Oliveri, *supra* note 11 (proposing the elimination of many of the sex crimes statutes that apply to voluntary sexual activity between teenagers); Guerrina, *supra* note 12 (focusing on sentencing issues).

When combined with the vibrant debate in the context of broader rape reform, a solid framework exists upon which to build further discussions concerning the construction of statutes responding to nonconsensual sexual activity between teenagers.

### CONCLUSION

The criminal law delineates basic, fundamental wrongs: Do not kill; do not steal; do not threaten another with harm.<sup>355</sup> In the context of sexual activity, the criminal law communicates two central messages: Do not have sex with a person without that person's consent, and do not have sex with a minor.<sup>356</sup> If properly drawn, the criminal law is capable of communicating these messages. If not properly drawn, the criminal law will lose its moral authority and have little impact on behavior.<sup>357</sup>

Oberman's proposal blurs these central messages. By relying on selective enforcement of overbroad strict liability laws, her proposal would make teenagers less certain as to acceptable conduct and less likely to alter their behavior to comply with the law. Oberman's approach also threatens to make it more difficult to prosecute cases of child sexual abuse and rape while diverting resources to cases that are not best dealt with by criminal sanctions. In contrast, objective criteria such as age differentials and position of authority provisions provide bright line, enforceable rules of conduct. Likewise, a precise definition of consent allows a clear message to be communicated to teenagers about unacceptable sexual behavior.

The problems associated with teenage sexual activity are complex.<sup>358</sup> Yet complexity should not result in confusion. Teenagers deserve to be protected from exploitive behavior with laws that are understandable, enforceable, and fair.

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<sup>355</sup> See generally ROBINSON, *supra* note 332.

<sup>356</sup> A related message is that older children do not ever engage in sexual activity with younger children.

<sup>357</sup> See Bryden, *supra* note 242, for a cogent argument that statutory reform in the area of acquaintance rape involving adults has not increased protection for these victims.

<sup>358</sup> No single reform will be adequate to protect teenagers from harmful sexual encounters. Numerous additional reforms related to evidentiary issues, reporting, and other areas will continue to be important in developing a comprehensive system that protects children. For a summary of other reform efforts, see LEVESQUE, *supra* note 1, at 235-38.

## APPENDICES

Appendix A					
Age of Consent in Each State <sup>1</sup>					
State	Age	State	Age	State	Age
Alabama	16	Louisiana	17	Ohio	16
Alaska	16	Maine	16	Oklahoma	15
Arizona	18	Maryland	15	Oregon	15
Arkansas	16	Massachusetts	16	Pennsylvania	16
California	18	Michigan	16	Rhode Island	16
Colorado	17	Minnesota	16	South Carolina	16
Connecticut	16	Mississippi	17	South Dakota	16
Delaware	16	Missouri	17	Tennessee	18
Florida	18	Montana	16	Texas	17
Georgia	16	Nebraska	16	Utah	16
Hawaii	16	Nevada	16	Vermont	16
Idaho	18	New Hampshire	16	Virginia	18
Illinois	17	New Jersey	16	Washington	16
Indiana	16	New Mexico	16	West Virginia	16
Iowa	16	New York	17	Wisconsin	16
Kansas	15	North Carolina	16	Wyoming	18
Kentucky	16	North Dakota	15		

<sup>1</sup> See ALA. CODE § 13A-6-62 (Lexis Supp. 2001); ALASKA STAT. § 11.41.436 (Lexis 2000); ARIZ. REV. STAT. ANN. § 13-1405 (West 2001); ARK. CODE ANN. § 5-14-127 (Lexis Supp. 2001); CAL. PENAL CODE § 261.5 (West Supp. 2002); COLO. REV. STAT. § 18-3-402 (2001); CONN. GEN. STAT. ANN. § 53a-71 (West 2001); DEL. CODE ANN. tit. 11, § 771 (Michie 2001); FLA. STAT. ANN. § 794.05 (West 2000); GA. CODE ANN. § 16-6-3 (Lexis 1999); HAW. REV. STAT. ANN. § 707-730 (Lexis Supp. 2002); IDAHO CODE § 18-6101 (Michie Supp. 2002); 720 ILL. COMP. STAT. ANN. § 5/12-16 (West Supp. 2002); IND. CODE ANN. § 35-42-4-9 (West 1998); IOWA CODE ANN. § 709.4 (West Supp. 2002); KAN. STAT. ANN. § 21-3504 (1995); KY. REV. STAT. ANN. § 510.060 (Lexis Supp. 2002); LA. REV. STAT. ANN. § 14:80 (West Supp. 2002); ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 2001); MD. CRIM. L. CODE ANN. § 3-307 (Michie 2002); MASS. GEN. LAWS ch. 265, § 23 (West 2000); MICH. COMP. LAWS § 750.520d (West Supp. 2002); MINN. STAT. ANN. § 609.344 (West Supp. 2002); MISS. CODE ANN. § 97-3-65 (Lexis 2000); MO. REV. STAT. ANN. § 566.034 (West Supp. 2002); MONT. CODE ANN. §§ 45-5-501, 45-5-503 (2001); NEB. REV. STAT. § 28-319 (1995); NEV. REV. STAT. §§ 200.364, 200.368 (Lexis 2001 & Supp. 2002); N.H. REV. STAT. ANN. § 632-A:3(II) (Lexis Supp. 2002); N.J. STAT. ANN. § 2C:14-2 (West Supp. 2002); N.M. STAT. ANN. § 30-9-11 (Michie Supp. 2002); N.Y. PENAL LAW § 130.25 (West Supp. 2002); N.C. GEN. STAT. § 14-27.7A (Lexis 1999); N.D. CENT. CODE § 12.1-20-05 (Lexis Supp. 2001); OHIO REV. CODE ANN. § 2907.04 (Supp. 2001); OKLA. STAT. tit. 21, § 1111 (West Supp. 2002); OR. REV. STAT. § 163.435 (2001); PA. CONS. STAT. tit. 18, § 3122.1 (West 2000); R.I. GEN. LAWS § 11-37-6 (Lexis 2000); S.C. CODE ANN. § 16-3-655 (1985); S.D. CODIFIED LAWS § 22-22-1 (Lexis Supp. 2002); TENN. CODE ANN. § 39-13-506 (Michie 1997); TEX. PENAL CODE ANN. § 22.011 (West Supp. 2002); UTAH CODE ANN. § 76-5-402 (Lexis 1999); VT. STAT. ANN. tit. 13, § 3252 (Lexis 1998); VA. CODE ANN. § 18.2-371 (Michie 1996); WASH. REV. CODE § 9A.44.079 (West 2000); W. VA. CODE § 61-8B-5 (Lexis 2000); WIS. STAT. ANN. § 948.09 (West 1996); WYO. STAT. ANN. § 6-2-304 (Lexis 2001).

In Hawaii, a 2001 amendment raised the age of consent to sixteen. See HAW. REV. STAT. ANN. § 707-730 (Lexis Supp. 2002). However, this language is to be repealed effective June 30, 2003, and return to the prior age of consent to fourteen unless the legislature affirmatively acts to retain sixteen as the age of consent. See Editor's Note to HAW. REV. STAT. ANN. § 707-730 (Lexis Supp. 2002).

<b>Appendix B</b> States in Which Certain Voluntary Sexual Activity Between Teenagers Is Exempted from Criminal Statutes <sup>1</sup>				
State	Name of Offense or Defense	Minimum Age of Defendant <sup>2</sup>	Age of Victim <sup>3</sup>	Age Differential
Alabama	2° rape	16	12–15	2 years
Alaska	2° sexual abuse of a minor	16	13–15	3 years
Arizona	Defense to sexual conduct with minor	19 or high school	15–17	none
Arkansas	4° sexual assault	20	under 16	none
Colorado	Sexual assault	none	under 15	4 years
	Sexual assault	none	15–16	10 years
Connecticut	1° sexual assault	none	under 13	2 years
	2° sexual assault	none	13–15	2 years
Delaware	Affirmative defense to rape	none	under 16	4 years
Hawaii	1° sexual assault	none	14–15	5 years
Indiana	Sexual misconduct with a minor	18	14–15	none
Iowa	3° sexual abuse	none	14–15	4 years

<sup>1</sup> See ALA. CODE § 13A-6-62 (Lexis Supp. 2001); ALASKA STAT. § 11.41.436 (2000); ARIZ. REV. STAT. ANN. § 13-1407(F) (West 2001); ARK. CODE ANN. § 5-14-127 (Lexis Supp. 2001); COLO. REV. STAT. § 18-3-402(1)(d) (2001); COLO. REV. STAT. § 18-3-402(1)(e) (2001); CONN. GEN. STAT. ANN. § 53a-70(a)(2) (West 2001); CONN. GEN. STAT. ANN. § 53a-71(a)(1) (West 2001); DEL. CODE ANN. tit. 11, § 762(d) (Michie 2001); HAW. REV. STAT. ANN. § 707-730 (Lexis Supp. 2002); IND. CODE ANN. § 35-42-4-9 (West 1998); IOWA CODE ANN. § 709.4(2)(c)(4) (West Supp. 2002); KY. REV. STAT. ANN. § 510.050 (Lexis 1999); KY. REV. STAT. ANN. § 510.060 (Lexis Supp. 2002); LA. REV. STAT. ANN. § 14:80(A)(1) (West Supp. 2002); ME. REV. STAT. ANN. tit. 17-A, § 254 (West Supp. 2001); MD. CRIM. L. CODE ANN. § 3-307 (Michie 2002); MINN. STAT. ANN. § 609.344(1)(b) (West Supp. 2002); MISS. CODE ANN. § 97-3-65(1)(a) (Lexis 2000); MISS. CODE ANN. § 97-3-95(1)(c) (Lexis 2000); MISS. CODE ANN. § 97-3-95(1)(d) (Lexis 2000); MO. REV. STAT. ANN. § 566.034 (West Supp. 2002); NEB. REV. STAT. § 28-319(1)(c) (1995); NEV. REV. STAT. § 200.364 (Lexis 2001); N.J. STAT. ANN. § 2C:14-2(c)(4) (West Supp. 2002); N.M. STAT. ANN. § 30-9-11(F) (Michie Supp. 2002); N.Y. PENAL LAW §§ 130.25, 130.40 (West Supp. 2002); N.Y. PENAL LAW §§ 130.30, 130.45 (West Supp. 2002); N.C. GEN. STAT. § 14-27.7A (Lexis 1999); N.D. CENT. CODE § 12.1-20-05 (Lexis Supp. 2001); OHIO REV. CODE ANN. § 2907.04 (Supp. 2001); OKLA. STAT. tit. 21, § 1112 (West 1983); OR. REV. STAT. § 163.345 (2001) (age as defense); OR. REV. STAT. § 163.435 (2001) (contributing); OR. REV. STAT. § 163.445 (2001) (sexual misconduct); OR. REV. STAT. § 163.355 (2001) (rape); PA. CONS. STAT. tit. 18, § 3122.1 (West 2000); R.I. GEN. LAWS § 11-37-6 (Lexis 2000); S.D. CODIFIED LAWS § 22-22-1(5) (Lexis Supp. 2002); TENN. CODE ANN. § 39-13-506 (Michie 1997); TEX. PENAL CODE ANN. § 22.011(e) (West Supp. 2002); UTAH CODE ANN. § 76-5-401.1 (Lexis 1999); UTAH CODE ANN. § 76-5-401.2 (Lexis 1999); VT. STAT. ANN. tit. 13, § 3252(a)(3) (Lexis 1998); VA. CODE ANN. § 18.2-371 (Michie 1996); WASH. REV. CODE § 9A.44.079 (West 2000); WASH. REV. CODE § 9A.44.089 (West 2000); W. VA. CODE § 61-8B-5 (Lexis 2000); W. VA. CODE § 61-8B-9 (Lexis 2000); WYO. STAT. ANN. § 6-2-304 (Lexis 2001).

<sup>2</sup> The terms "defendant" and "victim" are used here for convenience, with the recognition that participants to the sexual activity will only become potential defendants and victims if the older party falls outside the protected age parameter.

<sup>3</sup> All hyphenated ages are inclusive of both the lower and upper age provided in this column.

Appendix B (cont.)				
State	Name of Offense or Defense	Minimum Age of Defendant <sup>4</sup>	Age of Victim <sup>5</sup>	Age Differential
Kentucky	2° rape	18	under 14	none
	3° rape	21	under 16	none
Louisiana	Carnal knowledge of a juvenile	19	12-16	none
Maine	Sexual abuse of minors	none	14-15	5 years
Maryland	3° sexual offense	21	14-15	none
	4° sexual offense	none	14-15	4 years
Minnesota	3° criminal sexual conduct	none	13-15	2 years
Mississippi	Statutory rape	17	14-15	3 years
	Sexual battery	none	14-15	3 years
	Sexual battery	none	under 14	2 years
Missouri	2° statutory rape	21	under 17	none
Nebraska	1° sexual assault	19	under 16	none
Nevada	Statutory sexual seduction	18	under 16	none
New Jersey	Sexual assault	none	13-15	4 years
New Mexico	Criminal sexual penetration	18	13-16	4 years
New York	3° rape and 3° sodomy	21	under 17	none
	2° rape and 2° sodomy	18	under 15	4 years
North Carolina	Statutory rape	none	13-15	4-6 years
North Dakota	Corruption of minors	adult	15-17	none
Ohio	Sexual conduct with a minor	18	13-15	none
Oklahoma	Defense to rape	18	under 16	none
Oregon	Defense to contributing to delinquency	18	under 18	3 years
	Defense to sexual misconduct	none	15-17	3 years
	Defense to 3° rape	none	under 16	3 years
Pennsylvania	Statutory sexual assault	none	under 16	4 years
Rhode Island	3° sexual assault	18	14-15	none
South Dakota	Rape	none	10-15	3 years
Tennessee	Statutory rape	none	13-17	4 years
Texas	Sexual assault	none	14-16	3 years
Utah	Sexual abuse of a minor	none	14-15	7 years
	Unlawful sexual conduct	none	16-17	10 years
Vermont <sup>6</sup>	Sexual assault	16	under 16	none
Virginia	Causing delinquency	18	15-17	none
Washington	3° rape of a child	none	14-15	2 years
	3° child molestation	none	14-15	2 years
West Virginia	3° sexual assault	16	under 16	4 years
	3° sexual abuse	16	under 16	4 years
Wyoming	3° sexual assault	none	under 16	4 years

<sup>4</sup> The terms "defendant" and "victim" are used here for convenience, with the recognition that participants to the sexual activity will only become potential defendants and victims if the older party falls outside the protected age parameter.

<sup>5</sup> All hyphenated ages are inclusive of both the lower and upper age provided in this column.

<sup>6</sup> Interpreted by the state supreme court to be inapplicable to consensual sexual activity between juveniles under the age of sixteen. See *In re G.T.*, 758 A.2d 301 (Vt. 2000).



Appendix C States in Which Voluntary Sexual Activity Between Teenagers Is a Crime <sup>1</sup>			
State	Offense	Felony or Misdemeanor <sup>2</sup>	Age of Victim <sup>3</sup>
California	Unlawful sexual intercourse	Misdemeanor if within 3 years	under 18
	Forcible sexual penetration	Misdemeanor <sup>4</sup>	under 18
Florida	Lewd or lascivious offense	Felony	12-15
Georgia	Statutory rape	Misdemeanor	14-15
Idaho	Lewd conduct with minor	Felony	under 16
	Rape	Felony	under 18
Illinois	Criminal sexual abuse	Misdemeanor	13-16
Kansas	Unlawful voluntary sexual relations	Felony	14-15
Massachusetts	Rape and abuse of child	Felony	under 16
Michigan	3 <sup>rd</sup> criminal sexual conduct	Felony	13-15
	Sexual intercourse without consent	Felony	under 16
New Hampshire	Felonious sexual assault	Felony	13-15
South Carolina	Criminal sexual conduct with minors	Felony	under 16
	Sexual assault of a child	Felony	under 16
Wisconsin	Sexual intercourse with a child 16 or older	Misdemeanor	16-17

<sup>1</sup> See CAL. PENAL CODE § 261.5 (West Supp. 2001); CAL. PENAL CODE § 289(h) (West 1999 & Supp. 2001); FLA. STAT. ANN. § 800.04(4)(a) (West Supp. 2002); GA. CODE ANN. § 16-6-3 (Lexis 1999); IDAHO CODE § 18-1508 (Michie 1997); IDAHO CODE § 18-6101 (Michie Supp. 2002); 720 ILL. COMP. STAT. ANN. § 5/12-15(b) (West Supp. 2002); KAN. STAT. ANN. § 21-3522 (Supp. 2001); MASS. GEN. LAWS ch. 265, § 23 (West 2000); MICH. COMP. LAWS § 750.520d (West Supp. 2002); MONT. CODE ANN. § 45-5-503 (2001); N.H. REV. STAT. ANN. § 632-A:3(II) (Lexis Supp. 2002); S.C. CODE ANN. § 16-3-655(3) (1985); WIS. STAT. ANN. § 948.02 (West 1996); WIS. STAT. ANN. § 948.09 (West 1996).

<sup>2</sup> The term "felony" as used here indicates either that the offense is described as a felony in the statute or the statute does not use the term felony, but allows imposition of a sentence of one year or more. The term "misdemeanor" indicates either that the offense is described as a misdemeanor in the statute or the statute does not use the term, but limits the sentence to no more than one year.

<sup>3</sup> All hyphenated ages are inclusive of both the lower and upper age provided in this column.

<sup>4</sup> If the defendant is over twenty-one, the offense is a felony. See CAL. PENAL CODE §§ 261.5(d), 289(i) (West 1999 & Supp. 2001).

Appendix D Rape Statutes	
Citation	Citation (cont.)
ALA. CODE § 13A-6-61 (Lexis Supp. 2000)	MONT. CODE ANN. § 45-5-503 (2001)
ALASKA STAT. § 11.41.410 (2000)	NEB. REV. STAT. § 28-319 (1995)
ARIZ. REV. STAT. ANN. § 13-1406 (West 2001)	NEV. REV. STAT. § 200.366 (Lexis 2001)
ARK. CODE ANN. § 5-14-127 (Lexis Supp. 2001)	N.H. REV. STAT. ANN. § 632-A:2 (Lexis Supp. 2002)
CAL. PENAL CODE § 289 (West 1999 & Supp. 2001)	N.J. STAT. ANN. § 2C:14-2 (West Supp. 2002)
COLO. REV. STAT. § 18-3-402 (2001)	N.M. STAT. ANN. § 30-9-11 (Michie Supp. 2002)
CONN. GEN. STAT. ANN. § 53a-70 (West 2001)	N.Y. PENAL LAW § 130.35 (West Supp. 2002)
DEL. CODE ANN. tit. 11, § 773 (Michie Supp. 2000)	N.C. GEN. STAT. § 14-27.2 (Lexis 1999)
FLA. STAT. ANN. § 794.011 (West 2000)	N.D. CENT. CODE § 12.1-20-03 (Michie 1997)
GA. CODE ANN. § 16-6-1 (Lexis 1999)	OHIO REV. CODE ANN. § 2907.05 (1999)
HAW. REV. STAT. ANN. § 707-730 (Lexis Supp. 2001)	OKLA. STAT. tit. 21, § 1114 (West Supp. 2001)
IDAHO CODE § 18-6101 (Michie Supp. 2002)	OR. REV. STAT. § 163.411 (2001)
720 ILL. COMP. STAT. ANN. § 5/12-13 (West Supp. 2002)	PA. CONS. STAT. tit. 18, § 3121 (West 2000)
IND. CODE ANN. § 35-42-4-1 (West 1998)	R.I. GEN. LAWS § 11-37-2 (Lexis 2000)
IOWA CODE ANN. § 709.3 (West Supp. 2002)	S.C. CODE ANN. § 16-3-652 (1985)
KAN. STAT. ANN. § 21-3502 (Supp. 2001)	S.D. CODIFIED LAWS § 22-22-1 (Lexis Supp. 2002)
KY. REV. STAT. ANN. § 510.040 (Lexis 1999)	TENN. CODE ANN. § 39-13-503 (Michie 1997)
LA. REV. STAT. ANN. § 14:41 (West Supp. 2002)	TEX. PENAL CODE ANN. § 22.011 (West Supp. 2002)
ME. REV. STAT. ANN. tit. 17-A, § 253 (West Supp. 2001)	UTAH CODE ANN. § 76-5-402 (Lexis 1999)
MD. CRIM. L. CODE ANN. § 3-304 (Michie 2002)	VT. STAT. ANN. tit. 13, § 3252 (Lexis 1998)
MASS. GEN. LAWS ch. 265, § 22 (West 2000)	VA. CODE ANN. § 18.2-61 (Michie Supp. 2001)
MICH. COMP. LAWS § 750.520b (West 1991)	WASH. REV. CODE § 9A.44.040 (West 2000)
MINN. STAT. ANN. § 609.342 (West Supp. 2002)	W. VA. CODE § 61-8B-4 (Lexis 2000)
MISS. CODE ANN. § 97-3-95 (Lexis 2000)	Wis. STAT. ANN. § 940.225 (West Supp. 2000)
MO. REV. STAT. ANN. § 566.040 (West Supp. 2002)	WYO. STAT. ANN. § 6-2-302 (Lexis 2001)

